



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



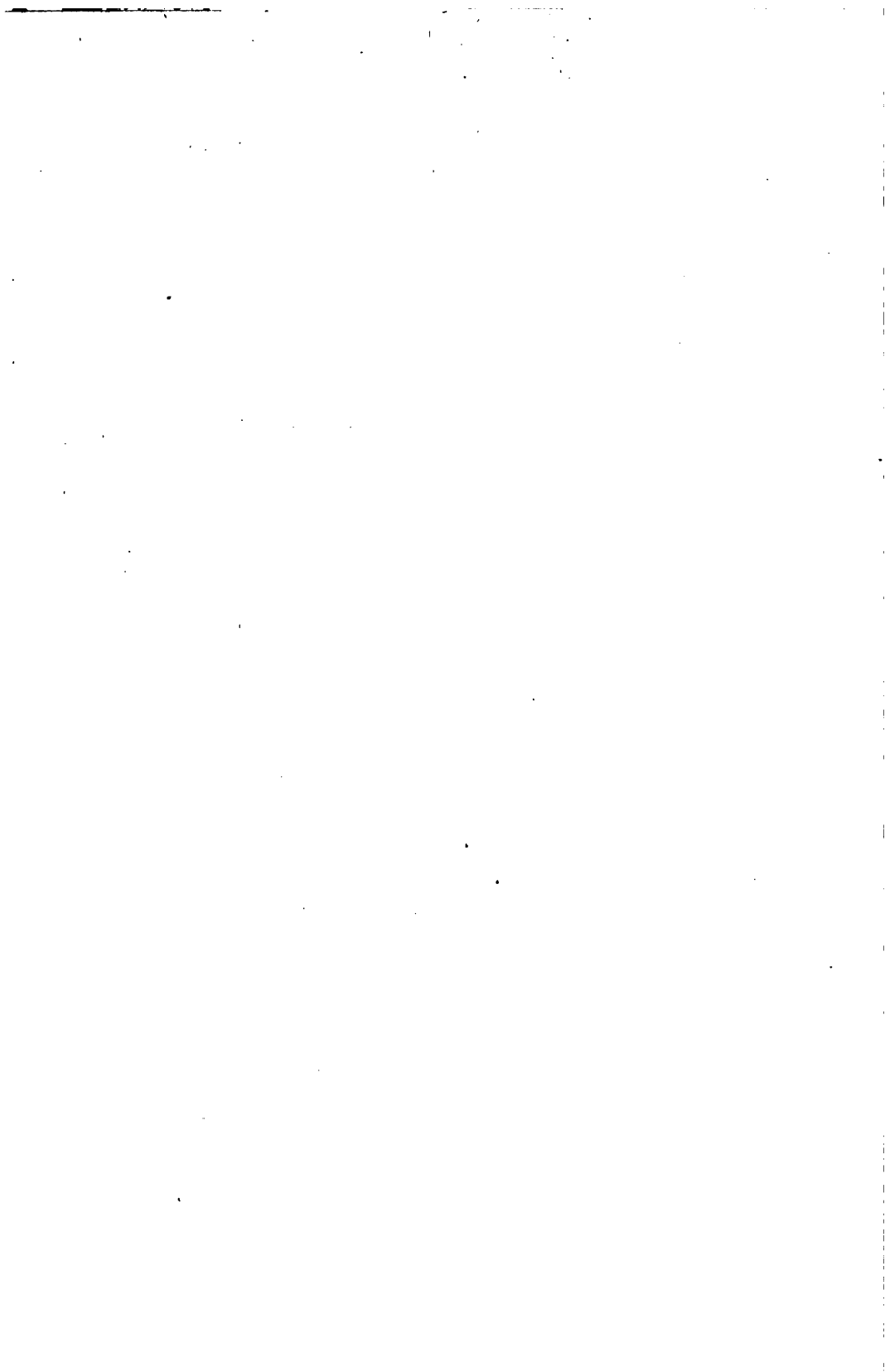
3 2044 078 679 966



HARVARD LAW SCHOOL
LIBRARY

11-11-11

11-11-11



LOUISIANA
ANNUAL REPORTS.

July 7

24

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT
OF LOUISIANA.

VOL. 46—FOR THE YEAR 1894.

PART II.

HENRY DENIS, REPORTER.

NEW ORLEANS:
F. F. HANSELL & BRO., PUBLISHERS.
1895.

Recd May 1, 1895.

State vs. Bates et al.

No. 11,488.

STATE OF LOUISIANA VS. GEORGE BATES AND PETER RAMP.

1. It is a rule subject to special exceptions that when a person is on trial for one offence evidence of another and extraneous crime is inadmissible. Such evidence is dangerous and calculated to lead to conviction upon a particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offences in order to produce conviction for a single one.
2. To make one criminal act evidence of another, a connection between the two must have existed linking them together. If the court does not clearly perceive the connection between the two offences (as to the commission of both of which evidence is tendered) it should give in the special case the benefit of the doubt to the prisoner.

46	849
52	1254
46	849
116	87
117	1094

A PPEAL from the Criminal District Court, Parish of Orleans.
Moise, J.

M. J. Cunningham, Attorney General, and *Jno. J. Finney*, Assistant District Attorney, for the State:

Evidence of other crimes of similar nature to that on trial is admissible to prove system, intent and guilty knowledge on part of accused in acts proved against him in a case on trial. Citing Knobloch *Crim. Dig.* 173, *et seq.*; *Wh. Cr. Ev.*, pars. 32, 33, 34 (note 2), 35, 36 (note 6), 37-40 (note 4), 43-44 (note 1), 45 (note 2), *et seq.*; *Bish. Cr. Pro.*, pars. 1065 (note 4), 1066 (note 1); *Greenleaf on Ev.* 4th Ed., Vol. 1, p. 80 (note b); 15 *Mo.* 168; 48 *Iowa*, 677; 84 *An.* 1083; 16 *An.* 376; 30 *An.* 600.

Paul W. Roussel Attorney for Defendant and Appellant:

The invariable rule in this State and in England is that where inadmissible evidence has been allowed to go to the jury in a criminal case, over prisoner's objection, he is entitled to relief. *Reg. vs. Gibson*, 16 *Cox*, C. C.; *State vs. Monie et al.*, 26 *An.* 513; *State vs. Perry*, 16 *An.* 444; *State vs. Gruso*, 28 *An.* 592; *State vs. Gregory*, 33 *An.* 743; *State vs. Mullen*, 33 *An.* 159; *State vs. Von Sachs*, 30 *An.* 943; *State vs. Carroll*, 31 *An.* 861; *State vs. Tucker*, 38 *An.* 791; *State vs. White*, 33 *An.* 97; *State vs. Molise*, 38 *An.* 384; 3 *Wharton C. L.*, 6th Ed., Secs. 3689, 3090.

State vs. Bates et al.

The opinion of the court was delivered by

NICHOLLS, C. J. Only one question is presented to us in this case. Defendant was convicted in the lower court upon an information for petty larceny and sentenced to imprisonment in the penitentiary for six months.

He complains in this as he did in the District Court of the ruling of the judge *a quo* in allowing, over his objections, the introduction of the testimony of several witnesses, which evidence he claims was to show that he was guilty of another separate and distinct larceny, committed at a different time and place, and of property belonging to a different owner.

His position is set forth in the syllabus of the brief of his counsel as follows:

"On trial of an accused charged with larceny, it is not competent for the State, in order to show the intent with which the act was committed, to prove him guilty of another larceny committed at a different time and place. *State vs. Johnson*, 38 An. 686, 688; *State vs. Palmer*, 32 An. 565; *Schaser vs. The State*, 36 Wis. 429.

"On the trial of an indictment for larceny evidence of DISTINCT thefts committed at *other times and places* than the one for which defendant is on trial is incompetent. *William vs. State (Texas)*, 6 S. W. Rep. 318; *English vs State (Texas)*, 15 S. W. Rep. 649.

"Evidence must be confined to the point at issue and the facts proven must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner disconnected with the charge. *Hudson vs. The State*, 3 Cold. (Tenn.) 355; *People vs. Sharp*, 107 N. Y. (Ot. App.) 427."

The general rule is that when a man is put upon trial for one offence he is to be convicted, if at all, by evidence which shows that he is guilty of that offence alone and that other offences committed by him are wholly excluded; therefore, the introduction of collateral evidence of extraneous crimes to show intent, motive, guilty knowledge, are exceptions to this general rule, and in order that this evidence be admissible at all it must bear directly and materially upon and have some connection with the issue before the jury. *People vs. Sharp*, 107 N. Y. 427; *Hudson vs. State*, 3 Cold. (Tenn.) 355; *English vs. State (Texas)*, 15 S. W. Rep. 649; *Commonwealth vs. Jackson*, 132 Mass. 16, and authorities cited therein.

There is no doubt that for certain purposes and under certain cir-

cumstances evidence is admissible of the perpetration by the defendant of a crime other than the one with which he is charged. The general rule, however, is against the introduction of such evidence and the exceptional circumstances, which justify a departure from the rule, should be clear and very convincing. This statement of the proposition shows that each case must, to a great extent, be passed upon in view of its own special facts. The subject is treated of at length in Rice on Evidence, Vol. 3, Chap. 25, Secs. 158 *et seq.*, and specially as to larceny in Chap. 42, Sec. 453.

The author in Sec. 157 says: "It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another;" and in Sec. 158 he says: "The indictment is all that the defendant is expected to come prepared to answer. Therefore, the introduction of another and extraneous crime is calculated to take the defendant by surprise, and to do him manifest injustice by creating a prejudice against his general character. * * * It would lead to conviction upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offences to produce conviction for a single one."

In the bill of exceptions reserved by the defendant to the action of the court in permitting the testimony of Dominecq, Chaplain and Kennedy to go to the jury, to show the intent of the accused (Bates) at the time of the larceny of the pool balls, charged to have been stolen on the 30th of September, 1893, the testimony of those witnesses is stated by him "to have been substantially as follows:

"That George Bates, in company with one William Daly, alias Chickens, did, on the day previous, enter the place of one J. P. Dominecq, and that after their departure five balls were found missing, which balls were subsequently found at Louis Chaplain's, where they had been sold by the said George Bates. That the said five balls, or any of them, were not the ones alleged to have been stolen from the place of M. Schultz on the 30th of September, 1893, for which the accused was then being tried, but the property of J. P. Dominecq, for which larceny the said George Bates stood charged upon an information pending before the said court."

State vs. Bates et al.

The judge's statement at the foot of the bill is as follows:

"Bates was tried alone, his co-defendant, Ramps, having escaped. The following facts were established: That the prisoner, accompanied by his co-defendant, entered the billiard room of the prosecuting witness, M. Schultz, and they were seen leaning against a billiard table upon which a set of fifteen pool balls was lying; that after remaining there awhile they took their departure together. Immediately thereafter two balls were missed from the table against which the defendants had leaned, and the proprietor, suspecting them of the theft, pursued and came in sight of the men several squares from his saloon. Ramps fled, while Bates was caught. Three pool balls were found in his possession, two of which were identified as belonging to the prosecuting witness, and the other unaccounted for and belonging to a different set. Bates' explanation was that the balls were given to him by Ramps and that he knew nothing of their theft. The State then offered to prove the larceny of other pool balls by this same defendant under similar circumstances and within a few days of the larceny charged in this information to prove system and intent. The evidence was admitted for those purposes. The jury was specially charged that no man should be found guilty of an offence charged against him by proof of his having committed another offence of the same nature; that if they found beyond a reasonable doubt that a larceny of other pool balls other than those charged in this information had been committed by the prisoner at the bar, that such evidence must be confined strictly to the question of 'intent.' This charge was given at the time the evidence objected to was admitted, and afterward in the general charge with explanations to make the principle clear."

The objection urged to the testimony was "that it was irrelevant and formed no part of the *res gestæ*; that it formed no connection with the case at bar and was part and parcel of another crime for which the accused stood charged and untried and had happened at a different time and place."

We find in the record a statement of facts made by the judge in connection with his action in overruling a motion for a new trial, but it is not embodied in any bill of exceptions, and we do not feel warranted in making use of it. We think it sufficiently appears from the record that the guilt of the accused, Bates, or his guilty connection with the first larceny referred to in the bill of exceptions,

is still a matter *in pais*, and doubtless had that case gone first to trial the evidence bearing upon the larceny charged in the present one would have been sought with equal propriety to have been introduced therein in either case to the great danger of "uniting evidence of several offences in order to produce conviction for a single one."

In *Shaffner vs. Commonwealth*, 72 Va. 60, 18 Am. Rep. 649 (Agnew, J.), it was said: "If the evidence be so dubious that the judge does not clearly perceive the connection (between the two offences), the benefit of the doubt should be given to the prisoner instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt."

The same judge, in the same case, very properly said: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor linking them together for some purpose he intended to accomplish. * * * Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offences instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offences charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner." We understand that the present case rested entirely upon circumstantial evidence, as would also the first larceny charged. There would be less objection than there is to the testimony which was received had Bates been "CONVICTED" instead of being merely "CHARGED" with the commission of the first offence. We do not plainly see the connection between the two offences. The admissibility of the testimony is not clear to us, and we deem it our duty, in this special case, to give the benefit of the doubt to the accused.

It is therefore ordered, adjudged and decreed that the verdict of the jury be set aside, and the judgment of the court rendered therein be annulled, avoided and reversed, and the case remanded for a new trial.

State vs. Bates et al.

ON APPLICATION FOR REHEARING.

MCENERY, J. The Attorney General and the district attorney for the parish of Orleans have filed an elaborated brief for a rehearing in this case.

The evidence as to the larceny of other pool or billiard balls was intended to prove that the defendant had a tendency to steal pool or billiard balls, and, as the brief says, to remove any doubt of his having committed the offence charged. It is stated in the brief, that without this evidence no jury would convict the defendant. Mr. Wharton says "it would be in entire variance with the usual view of the common law if a man's having been guilty of other offences, or having a tendency to commit them, should be received as evidence to rebut the presumption of his innocence of a particular charge." Wharton American Criminal Law, Sec. 640.

The only exception to this general rule that we are aware of prevails in the case of forgery, where the prosecutor is allowed to produce evidence of other instances of his having committed the same offence for which he is indicted.

There is a fundamental distinction between acts which may be proved to show malice or *scienter*, and the fact that the defendant had a tendency to commit the particular crime charged.

When the *scienter* or *quo animo* is requisite to, and constitutes an essential part of the crime with which the person is charged; and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct or declarations of the accused on trial, to establish such knowledge or intent, is competent; notwithstanding they may constitute in law a distinct crime. *Id.*, Sec. 649. And where several felonies are so connected together as to form an entire transaction, upon an indictment, for the one the other may be proved to show the character of the transaction.

The offence charged against the defendant had no connection or relation with the other offence. They were entirely distinct and separate acts, and the first could not explain the character of the second.

Rehearing refused.

No. 11,549.

STATE OF LOUISIANA VS. WILLIAM HOBGOOD AND WILEY STAFFORD.

The right of the trial judge to discharge a juror in case of evident moral and physical necessity before the panel is completed, or before evidence is introduced on the trial, is now a part of the fixed jurisprudence of this State.

Possession of property and an apparent ownership are sufficient to support the charges in an indictment for robbery and larceny. It is therefore immaterial whether the party from whom the goods were taken had placed them on the assessment roll.

The fact that the prosecutor had made oath to the assessment roll and left off the same, the money alleged to have been stolen, is not admissible in evidence to impeach his testimony for truth and veracity.

It is inadmissible, in order to attack veracity, to prove the bad character of a female witness for chastity, or to show that she is a prostitute.

Testimony that the accused broke jail is admissible testimony.

A side remark made by the assistant prosecutor *sotto voce* to the associate counsel that he will make no further objections to what the witness says is not a comment on the testimony of the witness, and is not of that character to affect the rights of the defendant. When no ruling of the court is asked, it is not apparent to which a bill in such a case applies.

Matters in the course of the trial which should be at once excepted to and bill reserved can not be urged in motions for a new trial.

A PPEAL from the Sixteenth Judicial District Court, Parish of Livingston. *Reid J.*

M. J. Cunningham, Attorney General, and *B. Edwards*, District Attorney, for the State, cite: 35 An. 764; 43 An. 365, 995; 44 An. 976; 30 An. 889; 19 An. 395; 38 An. 480; 33 An. 1410; 34 An. 392, 489; 39 An. 868; 37 An. 165, 576; 34 An. 919, 991; 41 An. 1067; 44 An. 160.

Jos. A. Reid Attorney for Defendant and Appellant:

Bad character may be proved against a witness for the purpose of impeaching his credibility, though the witness who testifies as to his character fail to state that his character or reputation is such that he would not be believed when testifying on his oath. *Mitchel vs. State* (Ala.), 10 So. 518; *State vs. Jackson*, 44 An. 160; 7 An. 83.

In discrediting a witness the inquiry is not limited to his general reputation for truth, but may be extended to his general moral

46	855
104	179
46	855
106	10
46	855
110	121
111	91
46	855
112	332
46	855
115	837
116	840
46	855
117	214
117	1004

State vs. Hobgood et al.

character. *State vs. Raven* (Mo. Sup.), 22 S. W. 376; *S' Houx*, 109 Mo. 654; *People vs. Harrison* (Mich.), 53 N. 93 Mich. 594.

It is error in the court and prejudicial to the accused to allow proof of a different crime to be introduced—*e. g.*, to allow proofs of jail-breaking on a trial for robbery, no connection existing between the two.

The opinion of the court was delivered by
MCENERY, J. The defendants were indicted for the crime of robbery, convicted and sentenced to hard labor.

They appealed.

They present eight bills of exception, including two for overruling separate motions for a new trial.

Bill No. 1 was taken to the ruling of the trial judge in discharging a juror who had been sworn and accepted, but discharged for cause before the completion of the panel.

The juror's wife was related to the accused. She was their second cousin, and this was sufficient for the dismissal of the juror from the panel. The right of the judge to discharge a juror in case of evident moral and physical necessity, is now a part of the fixed jurisprudence of this State, established by a number of decisions. In this case the jury had not been completed, and no evidence had gone to the jury. Reason and authority sustain the action of the trial judge. *State vs. Costello*, 11 An. 283; *State vs. Diskin*, 34 An. 919; *State vs. Moncla*, 39 An. 868; *State vs. Nash and Kid Barnett*, 46 An. 194, and cases and authorities cited therein.

Bill No. 2. The question was asked the prosecuting witness for the State on cross-examination if he had sworn to his tax assessments for the last few years. The object of the testimony was, as stated in the bill, to impeach the credibility of the witness, and also as tending to destroy the allegations of ownership of the property in said witness. The witness had testified that he had accumulated the money said to have been stolen before, during and since the war. For neither of these purposes was the testimony admissible. The fact that he did not swear to his assessment, or that he did, has no bearing in the case and was not by itself competent testimony. The fact that if he swore to the assessment, and failed to place the money alleged to have been stolen on the assessment rolls, would

not to destroy his actual or apparent ownership of the property, possession of the money without title would be sufficient to sustain the charge in the indictment. But the effect of the objection was done away with when the trial judge in his ruling permitted the introduction in evidence of such an oath if made. It was not offered in evidence.

Bill No. 3. The witness, Sophenia McLin, having been sworn for the State, to impeach her testimony, a witness was asked on cross-examination, "Do you know what the general reputation for chastity of Sophenia McLin is in the community in which she lives?"

On the objection of the prosecuting attorney the trial judge ruled against the admission of the testimony.

The defendants reserved a bill. They rely upon the case of *State vs. Parker*, 7 An. 88; *State vs. Jackson*, 44 An. 160, and *McInerney vs. Irwin*, 7 So. Rep. 841. The practice in our courts has been settled in the first case cited, but it goes no further than to allow the introduction of evidence as to general bad character, so as to show such moral turpitude in the witness that no one would be justified in believing him under oath. In such a case it is not necessary to restrict the inquiry to reputation for truth and veracity, but to show his character was such that the witness would not, from its viciousness, believe him under oath.

The inquiry must be into general character of the witness and not as to any particular act or any particular line of conduct, although after the general reputation is established the witness may, as in the case of *State vs. Parker*, state the disreputable lines of conduct of the witness, that he was "idle, dissolute, had a notorious character for acting fraudulently and falsely," of extorting money by force and cheating the unwary and feeble, and had no means of support and lived among lewd and abandoned women. From such vices, it is an inference, that no truth can spring.

In the case of *State vs. Jackson*, 44 An. 160, the testimony received was as to the habits of the witness in associating with lewd and abandoned women. On appeal to this court, we said the inquiry was restricted, and therefore did not come within the reasons stated in the case of *State vs. Parker*, 7 An. 88.

In paragraph 486, Wharton's Criminal Evidence, it is stated, and supported by reference to many cases in the several State reports, that "it has been held inadmissible, in order to attack veracity, to

State vs. Hobgood et al.

prove the bad character of a female witness for chastity, or to show that she is a prostitute, or to prove habits of intemperance which do not affect the perceptive or narrative powers."

In the case of *McInerny vs. Irwin*, 7 So. Rep. 841 (Supreme Court of Alabama), the rule as to general reputation to impeach the credibility of a witness is, in all essential respects, similar to the rule here. In that case, in reference to the impeachment of a female witness for chastity, the court said: "In refusing to permit the witness to be impeached by evidence of her alleged bad character for chastity and virtue, or by showing that she was a common prostitute, the Circuit Court but followed the settled rule of law announced by this and other courts on the subject."

Bill No. 4 is the same in effect as No. 3, and the reasons stated there for the sustaining of the ruling of the trial judge will apply to this bill.

Bill No. 5 was reserved to the ruling of the trial judge in the admission of testimony to show that the defendant, J. W. Stafford, subsequently broke jail. In his statement to the bill the trial judge says the testimony was offered "to prove flight by the accused and admitted by the court to show guilt, if unexplained."

The testimony was admissible. *State vs. Beatty*, 80 An. 1266; 81 An. 804; 37 An. 77.

Bill No. 6. The defendant, Wm. Hobgood, was on the witness stand and was ordered to give a certain conversation, which was admitted over the objection of the State. W. B. Kemp, assisting the prosecution, remarked aloud that he would not thereafter object to anything which Mr. Hobgood might choose to say. The defendant reserved a bill of exceptions to said remarks. It does not appear from the bill that the trial judge was called upon to make any ruling, and we do not see to what the bill is applicable. There was nothing in the remark to throw discredit on the testimony, and it was addressed to the associate counsel, [who had just urged an objection to a question to the accused by his counsel. "The remark," says the judge, "was made *sotto voce*."] The objection was frivolous.

Bill No. 7 is reserved to the overruling of the motion of the defendant, J. W. Stafford, for a new trial.

There was no testimony taken on the motion for a new trial, and it will not, of course, be necessary to notice that part of the formal allegation that the verdict was contrary to the law and the evidence:

State ex rel. Ward vs. Board of Assessors.

The motion alleges that the "assistant prosecuting attorney and district attorney argued to the jury and led them to consider evidence which had been ruled out by the court, as to the defendant, and further inducing the jury to base their verdict upon the testimony so ruled out."

The defendant's counsel made no objection to the argument at the time it was made, and called for no ruling of the court, upon which he could, if adverse to him, have reserved his bill. It is too late to make the objection in a motion for a new trial. And this statement will apply to objections to the charge of the judge to the jury in the motion. Objections to it should have been made in season. It can not be presented in a motion for a new trial.

Bill No. 8 is taken to the overruling of the motion of the defendant, Wm. Hobgood, for a new trial.

A motion for a new trial solely on the ground that the verdict is contrary to the law and the evidence is not entitled to notice by this court. This has so often been decided that its discussion here is wearisome.

Judgment affirmed.

No. 11,492.

STATE OF LOUISIANA EX REL. JOHN WARD VS. BOARD OF ASSESSORS.

Property leased for manufacturing purposes is not exempt from taxation under Art. 207 of the Constitution.

The word "employed" used in said article means invested.

The lessor not having invested said property in the manufacturing interest for which he leased it, the property so leased is not exempt from taxation.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Charles Louque Attorney for Relator, Appellee: .

Under Art. 207 the property employed in the manufacture of machinery is exempt from taxation, even when leased by the owner to a manufacturer.

E. A. O'Sullivan, City Attorney and *Henry Renshaw*, Assistant City Attorney, for Defendants and Appellants:

The relator employs his property for a renting purpose, not for a manufacturing purpose. The manufacturer may claim exemp-

State ex rel. Ward vs. Board of Assessors.

tion because of the meritorious employment he makes of his property, to-wit, its use in manufacture. The relator, however, employs his property to obtain a rent; he makes no such use of his property as justifies him in claiming the favor of the State, but he vicariously pleads the merit of his tenant.

The opinion of the court was delivered by

McENERY, J. This is a *mandamus* proceeding to compel the canceling of assessments against relator's property for the year 1893.

Its exemption from taxation is claimed under Art. 207 of the Constitution, relieving the capital and machinery employed in certain manufactories from the payment of taxes.

The relator was formerly engaged in the manufacture of machinery, and his property engaged in said business was exempted from taxation under the provisions of Art. 207 of the Constitution.

He sold his tools and machinery to other parties, and leased to them the lot and building. They continued the same business.

Relator claims exemption for the lot and building, because this property is still employed in the production of machinery.

It is an invariable rule that exemption laws must be construed strictly. They must be confined within the limits intended by the law-givers.

The object of the article in the Constitution is to encourage the production of certain articles mentioned in the article. The exemption was intended to induce the owners of capital and machinery to employ them in the manufacture of said articles.

The exemption was based upon the ownership or interest in the capital, machinery and property employed in the enterprise and an interest in the products. It is addressed to manufacturers—those who would have an interest, by the investment of capital, in the products of manufacturing establishments.

The relator has no interest in the manufacture of the machinery by his tenants. He is an utter stranger to the enterprise, and has no capital invested in it. He is the lessor of the property in which the manufacture is conducted, and because it is leased for the purpose of carrying on a manufacturing establishment can not, by any possible reasoning, convert it into capital or property invested or employed in the industry conducted by his tenants.

City vs. Board of Administrators.

The article of the Constitution is very plain. It says: "The capital, machinery and other property employed in the manufacture of * * * machinery shall be exempt for twenty years from taxation." The word employment means invested as used in the article.

Under the interpretation of the article asked by relator, every species of property not owned by the manufacturer but used about the premises or in the manufactory would be exempt. Carts and wagons employed in hauling to depots for shipment, and to bring materials to the factory, would be exempt, notwithstanding they are hired to it by other parties, who pursue a distinct and separate calling. The article does not intend to exempt these, nor does it intend to exempt the lessors of property who happen to find a tenant who is a manufacturer and uses the property in his special calling.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that the rule granted herein be discharged at relator's costs.

No. 11,523.

CITY OF NEW ORLEANS VS. BOARD OF ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND.

The Board of Administrators of the University of Louisiana having contracted and agreed with the city of New Orleans, for a fair and adequate consideration, to educate five boys of indigent parents, to be appointed annually from the public schools of the city of New Orleans, said administrators and their successors and assigns can be kept to their agreement, and held bound to accept and educate the designated number of boys of indigent parents, when properly appointed.

The mayor of the city is incapacitated to enter into an act of compromise, and bind the city thereby, unless specially authorized by competent authority, and he can not, by acting under such a compromise, estop the assertion of the city's legal rights.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

E. A. O'Sullivan, City Attorney, for Plaintiff and Appellee:

A contract entered into under the laws by the City Council can not be in any way modified or impaired by any officer of the council. To be appointed annually means to appoint each year.

J. McConnell and *E. H. Farrar* Attorneys for Defendants and Appellants:

A party can not enjoy the fruits of a compromise and at the same time repudiate the corresponding obligation imposed on him by it. *Stewart vs. Haas*, 28 An. 784.

In this case the petition represents that the city taxes, amounting to twenty-six thousand six hundred and forty-one dollars and thirteen cents in value, were remitted, as the consideration for certain free scholarships, while, on the contrary, the ordinance of the City Council directing the remission to be made is silent as to the value, and describes said taxes as being uncertain in amount or value, and uncollectible by legal process. The right to collect these same taxes from the "Mechanics' Society" being reserved by the City.

When the City, in consideration of the remission of taxes of uncertain value and uncollectible by law, as above stated, has secured five continuous free scholarships, and the university, to avoid contention, consented to receive and educate double the number required by the agreement, the City has no just ground of complaint.

When an agreement stipulated that the university should educate five boys of indigent parents, to be appointed by the Mayor and Administrators of the City, it is incompetent for the City, by subsequent ordinance, passed without the consent of the University, to change the status of the appointees, or vest the power of selection exclusively in the Mayor.

Where a clause in a contract, otherwise doubtful, has received an interpretation by the conduct of the parties for a period of nine years, whether by both parties, or by one with the express or implied assent of the other, furnishes a rule for its interpretation. C. C., Art. 1956.

The opinion of the court was delivered by

WATKINS, J. The object of this suit is to obtain the enforcement of an alleged contract which the defendants entered into to educate five boys of indigent parents, to be appointed annually from the public schools of the city of New Orleans; that is to say, to coerce the said administrators to receive *annually* five cadets, to be

appointed by the mayor, and to give them the regular course of education established by that institution.

It is alleged that the consideration of said contract was the remission on the part of the city of the taxes assessed against the property formerly known as the Mechanics' Institute, for several years, so as to enable the *then* University of Louisiana to purchase the same for educational purposes.

It is further alleged that by an act of the Legislature additional powers were conferred upon said university, and "in recognition of the benevolent acts and munificent gifts of Paul Tulane the corporate name of the University of Louisiana was changed to the Tulane University of Louisiana, and created in lieu and stead of the State Board of Administrators of the University of Louisiana the Board of Administrators of the Tulane Educational Fund."

It is further alleged that demand was made by the mayor of the city upon the defendant administrators to receive five boys to be by him appointed annually, in conformity to the aforesaid contract—naming the five boys to be by him appointed—and that said demand was by the defendant administrators refused.

Plaintiff's prayer for judgment conforms to the allegation of its petition.

The defendants' answer avows their willingness, "as provided in said Ordinance No. 6767, to educate five boys of indigent parents, to be appointed annually from the public schools by the mayor and administrators of the city of New Orleans; *meaning thereby that there shall be five scholarships so appointed, the vacancies in which are to be filled annually, and not as illegally claimed, that every year the mayor is entitled to appoint five students who are to receive free education at the hands of this board.*"

Further answering, they aver "that the said ordinance was the subject of contention between the mayor of said city and Board of Administrators of the University of Louisiana, as to what the rights of the mayor was under the said ordinance, and after much discussion the said board * * on the 14th of April, 1883, adopted a resolution * * to the effect that the obligation of said board extended only to furnishing free tuition to five students, and that the mayor had power to fill all vacancies in the five, whenever occurring, so that there should be always five students in the university without cost, and no more. That on the 10th of May, 1883, a resolution was

City vs. Board of Administrators

adopted by said board * * which purported to be a compromise between said city and Board of Administrators, proposed by the city attorney, by which said board agreed to educate ten (10) boys of indigent parents, to be appointed as mentioned in said Ordinance 6767, all vacancies to be filled by the mayor. It being the intent of said resolution that ten boys should be so educated free in said University of Louisiana, the term of tuition to be four years."

The defendants further aver and represent that during the ten years that have intervened between the date of the adoption of the said resolution and the receipt of the mayor's demand of date May 10, 1892, the selection and appointment of ten students has been made in accordance with the aforesaid compromise; and they further and finally state that, "without admitting any legal liability in the premises, and with full reservation of all and singular their legal rights in the premises, they are willing that ten students should continue to be received and educated in the manner and according to the terms of said compromise."

On these issues the following judgment was pronounced in favor of the plaintiff, namely: "Declaring the contract entered into between the defendant and the city of New Orleans to be in full force and effect, and commanding the said board to receive, within thirty days, and to continue to receive each and every year thereafter, five boys, to be selected under said contract by the mayor of New Orleans, and to retain said boys, yearly appointed as aforesaid, until their collegiate course is completed, under the rules and regulations of the said university."

From this judgment the defendants prosecute this appeal.

It is evident that there are but two questions for our consideration; (1) the import of the defendant's original contract; (2) the effect of the alleged compromise.

While the contract is found in a *proviso* at the foot of the ordinance, yet we think it but right that we should reproduce the entire ordinance, and have extracted same from the defendant's brief:

"CITY ORDINANCE No. 6767.

"MAYORALTY OF NEW ORLEANS, }
"City Hall, December 22, 1880. }

(No. 6767. Administration Series.)

"Whereas, it is to the interest of the people of this city that every facility be afforded the University of Louisiana for increasing its use-

City vs. Board of Administrators.

fulness and furthering its purposes of education, now so well begun and ably conducted, and it is represented to the council by the president of the board of administrators that more room and buildings are needed, and that the building known as the 'Mechanics Institute' is, from its location and construction, the only suitable and possible addition to be had;

"Whereas, it is further represented by said board that an opportunity now offers by which they can obtain every right and title in and to said Mechanics' Institute for a small price, but that they are prevented or deterred from acting because of certain taxes claimed by the city of New Orleans as due by the Mechanics' Society, and asserted to be an incumbrance on said property; and whereas, said taxes are only due for such times as said building was not occupied by the 'society,' and then only on the value of the parts not so occupied, inconsistencies which would greatly reduce the said taxes as they now stand; and further, considering that the partial title now existing in the State has prevented and will forbid the subjection of said property by the city to the payment of said taxes by a sale or other conveyance, in that no satisfactory and indefeasible title can be made to a purchaser; therefore:

"SECTION 1. Be it ordained by the Mayor and Administrators of the City of New Orleans in council convened, That any tax lien, privilege or mortgage heretofore claimed by the city of New Orleans for any municipal taxes assessed on the 'Mechanics' Society,' for any and all years, and written or recorded as bearing on the property known as the 'Mechanics' Institute,' be relinquished, canceled and annulled as to said property whenever the University of Louisiana, through its Board of Administrators, shall have obtained full title to and possession of said property, and to this end the mayor is instructed to intervene in the act affecting such transfer of title and giving possession, to carry out the provisions of this ordinance, and until said intervention and act has been completed said taxes and privileges, etc., shall continue undisturbed; *provided nothing herein shall be construed as relieving the 'Mechanics' Institute' from its obligations for said taxes.*

"SEC. 2. Be it ordained, etc., That a copy of the title to said Board of Administrators, embodying the intervention of the mayor as aforesaid, shall be furnished the administrator of accounts of the city of New Orleans, and the same shall be and constitute his

City vs. Board of Administrators.

authority to erase and annul from his books, and from those of the recorder of mortgages, all of said taxes, privileges and mortgages, so far as they affect said property—the Mechanics' Institute.

“ Provided, that the said institute binds itself to educate five boys of indigent parents, to be appointed annually from the public schools by the mayor and administrators of the city of New Orleans.

“ Adopted by the council of the city of New Orleans, December 21, 1880.”

The controverted question is now, as it has been for many years past, as to the correct interpretation to be placed upon the phrase “to educate five boys of indigent parents, to be appointed annually,” as it occurs in the proviso to Ordinance 6787.

Both the city and the administrators have given their respective interpretations thereof, as the foregoing sketch of the pleadings discloses, and the district judge having accepted that of the plaintiff as the correct one it is our province to determine whether his opinion is erroneous *vel non*.

The code has established and formulated certain fixed rules for “the interpretation of agreements.”

One article declares that “legal agreements having the effect of law upon the parties, none but the parties can abrogate or modify them. * * * That courts are bound to give legal effect to all such contracts according to the true intent of all the parties.

“That the intent is to be determined by the words of the contract, when these are clear and explicit, and lead to no absurd consequence.” R. C. C. 1945.

Another article declares that “the words of the contract are to be understood like those of a law, in the common and usual signification, without attending so much to grammatical rules as to general and popular use.” R. C. C. 1946.

Another article declares that “all clauses of an agreement are interpreted, the one by the other, giving to each the sense that results from the entire act.” R. C. C. 1955.

Following these rules for the interpretation of agreements we are of opinion that the judge *a quo* gave a correct interpretation to the language of the proviso of the ordinance. The intent and purpose of the parties are plainly and easily discoverable from “the words of the contract.” The obligation of the defendant was “to educate five boys of indigent parents, to be appointed annually from the public

City vs. Board of Administrators.

schools." These words mean just what they say, "five boys * * appointed annually;" and, as the courts are bound to give legal effect to all contracts according to the intent of the parties, we feel bound to affirm the correctness of the ruling of the district judge in this respect.

With reference to the alleged compromise, set up as a matter of defence, there is nothing said in the judgment, but from the tenor of it, it is to be presumed the judge disregarded it; he could not have otherwise reached the conclusions he did.

The following is an extract from the minutes of the Board of Administrators of the University of Louisiana of March 28, 1883, viz.:

"EXTRACTS FROM MINUTES.

"Extract from minutes of the Board of Administrators of the University of Louisiana, held March 28, 1883. Present: President J. H. Kennard, and Messrs. Howard, Macon, Labatt, Lavillebeuvre, Seymour, Lafitte and Mayor Behan, constituting a quorum.

"The president stated that the meeting had been called at the request of the mayor, who wished to learn exactly the agreement concerning the five scholarships in the academical department of the university, allowed the city of New Orleans. Mr. Mayor Behan wished to know whether he had the right to appoint five persons to scholarships each year, without considering whether those appointed in previous years remain at the university or not, or whether it had been agreed that not more than five persons appointed by the city should be entitled to tuition free at any one time. After much discussion, during which Mr. Baldwin entered and took his seat, it was decided, upon motion of Mr. Macon, that the decision of the question should be postponed until the original resolution of the board, which the secretary was unable to find, granting the right to the city, could be found.

"Respectfully,

"CHAS. B. STAFFORD, *Secretary*."

The following is an extract from the minutes of the board in April, 1883, viz.:

"*Be it resolved*, That the sense of this board with reference to the rights of the city of New Orleans to the appointment of free students to the University of Louisiana is that the obligation resting on the university, under the existing ordinance and agreement, extends

City vs. Board of Administrators.

only to furnishing tuition free to five students; that the mayor has power to fill all vacancies in the five whenever occurring; the true intent and meaning being there shall be five students in the university without cost, and no more.

"Mr. Labatt and Mayor Behan voted against the resolution."

The following is an extract from the minutes of the Board of Administrators on the 16th of May, 1883, viz.:

"Extract of minutes of Board of Administrators of the University of Louisiana, held May 10, 1883:

"The president stated that the object of the meeting was to consider the matter of city scholarships. Judge Kennard stated that he had had a conference with the city attorney, and that to save the university from the expense of litigation he had agreed to present to the board a resolution drawn up by the city attorney, with some changes agreed to by the same person, settling the matter by compromise. The president then read the motion, which was as follows:

"Whereas, a doubt exists as to the number of boys it is the duty of the University of Louisiana to educate at one time under the provisions of Ordinance No. 6767, A. S., and as it is for the best interest of all parties that the same should be amicably arranged, and that equal justice should be done both to the University and to the City;

"Be it resolved by the Board of Administrators of the University of Louisiana, that the board, etc., binds and obligates themselves always to educate at one time ten boys of indigent parents, said boys to be appointed in the manner pointed out in the Ordinance No. 6767 aforesaid, all vacancies to be filled by the mayor. It being the full intent of this resolution that there shall always be ten boys, as aforesaid, educated free in the university at one and the same time, and no more; the term of tuition to be four years, said students to be subject to the same rules when admitted as other students.'

"Mr. Baldwin entered while the motion was being considered, and the president restated the case. Mr. Lafitte then offered the board the resolution prepared by the city attorney. Mr. Lavillebeuvre seconded it, and it was unanimously carried."

Taking into consideration the foregoing proceedings and resolutions of the Board of Administrators, and giving to them the full weight and force to which they are entitled, it is our opinion that they do not evidence a compromise, for the main reason that they

City vs. Board of Administrators.

were *ex parte*. It is quite true that they disclose that the president of the Board of Administrators had an interview with the city attorney in reference to city scholarships, "and that, to save the university from the expense of litigation, he had agreed to present to the board a resolution drawn up by the city attorney, with some changes agreed to by the same person, settling the matter by compromise;" but neither the proceedings nor the resolution of the board declare that the city attorney had authority to bind the city in any manner, or that he had acted on the request or at the suggestion of the proper city authorities in so doing. And the proceedings, as well as the resolution, show that it was the resolution of the Board of Administrators *alone* that construed their previous contract, without the sanction or concurrence of the city; and it is therefore not binding on the city as a compromise.

The defendants' counsel invite our attention to their willingness to receive and educate five boys of *indigent parents* as stipulated in the Ordinance 6767 and refer to the altered phraseology of the Ordinance No. 7050, adopted January 8, 1882, in this respect. It is as follows, to-wit:

"Ordinance 7050: Be it resolved, That the mayor is hereby authorized to select and appoint *said five cadets* from among the deserving boys or lads attending the public schools of the city of New Orleans. Adopted January 8, 1882."

That ordinance did not and could not alter the terms of the prior ordinance and the contract made under it in any respect. Under this last ordinance the appointing power was conferred upon the mayor *alone*, in lieu of the mayor and administrators of the city; but it did not relieve the mayor from the duty of making selections of appointees from those boys who have indigent parents—the language of this ordinance being "to select and appoint *said five cadets*." It is of equivalent import. We do not regard it of any special consequence that the mayor acted on the faith of the alleged compromise and annually appointed the number of boys therein designated. The city could be no more bound or estopped by the *ex parte* action of that officer, in this respect, than in attempting to effect a compromise, or in assenting to it after it was made as stated.

Judgment affirmed.

No. 11,500.

WILLIAM J. BEHAN ET ALS. VS. BOARD OF ASSESSORS ET ALS.

1. Under the revenue law of 1890 real estate, with the buildings, improvements and appurtenances, are directed and required to be separately assessed from the machinery, apparatus, etc., appertaining to a jute factory thereon placed.
2. Notice having been served upon the parish board of assessors, to the effect that the property of a manufacturing establishment is exempt from taxation, can not serve as a demand for the reduction of an excessive assessment.
3. The filing of an assessment roll in the office of the recorder of mortgages acts as a lien upon each specific piece of real estate thereon assessed, and the same property becomes subject to a legal mortgage after the 31st day of December of the current year.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Farrar, Jonas & Kruttschnitt Attorneys for Plaintiffs and Appellants:

Separate assessments of the naked real estate, and of the improvements upon it, are violative of Sec. 16 of Act No. 106 of 1890, and are absolutely null and void.

Under Sec. 32 of Act No. 106 of 1890, the delivery of the tax roll to the recorder of mortgages does not operate a lien or mortgage upon the property until the 31st day of December of the current year. Hence the purchaser of property in May purchased the property free from mortgages for the taxes of the current year.

R. Lyon for Tax Collector, Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. Alleging themselves to be the joint owners of certain real property situated in the city of New Orleans, and described in their petition, together with all of the buildings and improvements thereon, as well as all of the rights, ways, servitudes and privileges thereto appertaining, and also of the entire machinery, engines, boilers, loom, frames, shaftings, pulleys, elevator, etc., thereon situated—the whole constituting the plant and fixtures of said property—the petitioners represent that, on the 3d day of May, 1893, same was purchased for their account at sheriff's sale,

and that the *proces verbal* of adjudication thereof was duly registered in the conveyance records of the parish of Orleans on the 19th of July, 1893.

That, upon examination of the tax records and the recorder's office, they find certain assessments against the property, which, in their estimation, are null and void, and should be so adjudged and declared, and canceled and erased for the following reasons—same being summarized in the plaintiff's brief, as follows, viz.:

“The points for which we contend, and upon which we rely to establish the absolute nullity of the second assessment, are as follows, to-wit:

“1. That the assessment for machinery and appurtenances is a dual assessment, as this property is covered by the assessment of the real estate upon which it is located.

“2. That even if it be not a dual assessment, it is null and void, because it is an assessment of fixtures or immovables by destination separate from the real estate to which the same are attached.

“And even if the assessment be not entirely null and void, we claim that it does not operate a lien upon the property of the plaintiffs, for the reason that they acquired this property at sheriff's sale before the taxes for the year 1893 had matured so as to become a lien.”

The prayer of the petition is, in substance, that the judgment of the court decree that the assessment placed by the Board of Assessors on the assessment rolls of 1893, for the sum of one hundred and twenty thousand six hundred dollars, “on the jute factory, all machinery and appurtenances, locomotive and all other motive powers,” is absolutely null and void and of no effect; or that in the alternative, it decree that said assessment does not bear a lien and privilege upon said property; and that in the event both the assessment and lien be maintained, that the latter be so reduced as to correspond with the true value thereof.

The answer of the Board of Assessors and tax collector is a general denial.

On these issues the case was tried and judgment rendered in favor of the defendants, and the plaintiffs have appealed.

The case of the plaintiffs is very carefully stated in their counsel's brief, and for the purpose of being accurate we extract the portion that is deemed most pertinent, to-wit: “That both

Behan et als. vs. Board of Assessors et als.

of said assessments are in the name of the Crescent Jute Manufacturing Company; that they are both on the same property; that all of the machinery, appurtenances and motive power of every description whatsoever, in the jute factory at the corner of Chartres and St. Ferdinand streets, are upon the real estate described in the first of said assessments, and are appurtenances and a part of said real estate, and are immovables by destination. That said assessment, upon the cash value of lands and lots of ground aforesaid, including buildings and improvements of whatever kind, assessed at twenty-nine thousand four hundred dollars, exhausted the power of the Board of Assessors, and that said second assessment is a duplicate or dual assessment, and therefore null and void; that the Crescent Jute Manufacturing Company, which was the owner of said property at the time when the assessment rolls of the parish of Orleans were exposed for inspection in the year 1893, applied for the cancellation of said assessment to said Board of Assessors during the time prescribed by law, but that the assessors, nevertheless, failed to cancel the said assessment, and that the assessment is null, not only because it is a dual assessment, but also because the said machinery, motive power and everything included in said assessment of one hundred and twenty thousand six hundred dollars constitutes machinery and property employed in the manufacture of textile fabrics in a factory, wherein more than five hands are and were employed, and that the same is therefore exempt from taxation by Art. 207 of the Constitution, for the year 1879; that the sum of twenty-nine thousand four hundred dollars, at which the said real estate is assessed, is greater than the full market value of the real estate, and of all the machinery, appurtenances and improvements thereupon, including the property covered by said second assessment, and that the real value of all of said property, so assessed at twenty-nine thousand four hundred dollars, does not and did not at the time of the assessment exceed twenty thousand dollars; that even if the assessment on machinery was not a dual assessment, it is null and void because an assessment of improvements on real estate separate from the real estate upon which the same are located contrary to the laws of this State; that even if the assessment be declared to be a legal and valid assessment against the Crescent Jute Manufacturing Company, it is, nevertheless, inoperative, in so far as the property acquired by petitioners is con-

cerned, and does not bear a lien or privilege upon the same because the same was acquired by petitioners at sheriff's sale, prior to the time when the same became a lien upon said property under the laws of the State of Louisiana."

(a) The following is a verified copy of the assessment complained of, viz.:

"Assessment Roll for the Parish of Orleans, 1893.

OBJECTS OF TAXATION.

Names of Taxable Persons.	Names of Streets.	(1) Cash Value of Land, etc.
Crescent Jute Manufacturing Co.	Chartres and St. Ferdinand.	\$29,400
* * *	* * *	* * *
		(18) Cash Value of Machinery.
Crescent Jute Manufacturing Co.	Chartres and St. Ferdinand.	\$120,600."

The foregoing constitutes a single assessment, and is not in any sense a dual or double assessment, or one that was made by piecemeal, and at different times or dates.

The roll—an extract from which is brought up in the original—plainly shows that under heading No. 1, "Cash value of all lands and lots * * including buildings and improvements of whatever kind," the lots of ground and the buildings and improvements thereon belonging to the Crescent Jute Manufacturing Company, were assessed at twenty-nine thousand four hundred dollars; while under heading No. 18, "All machinery and appurtenances, locomotive and all other motive power" belonging to said company were assessed at one hundred and twenty thousand six hundred dollars. This assessment was made in exact compliance with the blanks furnished to and in use by the parish assessors.

An examination of Sec. 1 of Act 106 of 1890 shows that the assessment was made in exact conformity to its provisions, the act in terms requiring an assessment of "all real estate, with the buildings and improvements thereon or thereto attached," as one item of

Behan et als. vs. Board of Assessors et als.

property that is subject to assessment; and separate and apart from this is the assessment of "engines, boilers, apparatus, appurtenances, appliances and attachments for steam, electric and other engines," and the like. It matters not that a portion of the latter description of property was, at the time, immovable by destination, the Legislature was perfectly competent to authorize and require an assessment made in this manner, and it was the manifest duty of the revenue officers to accept it, and act under it as their guide.

(b) As the proof shows that all the properties assessed belonged to the Crescent Jute Manufacturing Company, and this establishment had not been actually engaged in manufacturing jute for at least two years prior to the assessment in question, same is not exempt from taxation under Art. 207 of the Constitution. But this exemption is not pressed in argument.

(c) With respect to the objection that was urged on the part of the Crescent Jute Manufacturing Company to the assessment previous to the sale of the plaintiffs, the preponderance of evidence shows the objection urged by the corporation was that it was *not liable to assessment at all*, and not that the assessment was based upon too great a valuation—consequently, the Board of Assessors did not have before them for consideration the question of the *reduction* of the assessment at all.

One of the notices that was served on the president of the board will suffice. It is of the following tenor, viz.:

"NEW ORLEANS, March 15, 1893.

"*Mr. J. M. Gleason, President Board of State Assessors, Parish of Orleans, City Hall:*

"DEAR SIR—I am instructed by our president, Mr. F. A. Behan, to say that we object to *any taxes being levied* against our factory, as our laws exempt manufactories in textile fabrics from any and all taxes.

"The supposition that we made no continual runs last year does not debar us from benefaction, according to our legal adviser's opinion.

"Very respectfully,

"CRESCENT JUTE MANUFACTURING COMPANY,

(Signed)

"LOUIS MOTHS, *Secretary.*"

In July, 1893—long subsequent to the sale of its property to the plaintiffs—the secretary of the company addressed a communication

Beard vs. Lufriu.

to the State Auditor, requesting the cancellation of the assessment, on the ground that the factory had been shut down for three years, and portions of the machinery had been used for other purposes, but this application was declined by the auditor, on account of his want of authority to make the cancellation.

As there was no preliminary application for the reduction of the assessment of the property of the Crescent Jute Manufacturing Company prior to the sale thereof to the plaintiffs, the latter can not now be heard to make complaint in a court of justice, that the assessment was erroneous or excessive. *Shattuck & Hoffman vs. City*, 39 An. 206.

(d) Under the law it was the duty of the assessors in the city of New Orleans to file with the recorder of mortgages a complete assessment roll by the 1st of June, and it is made the duty of the recorder of mortgages to immediately file said roll, and to retain and keep same among the records of his office—though the inscription thereof in the mortgage office “shall not operate as a lien or mortgage upon the property until the 31st of December of the current year.” Secs. 31 and 32 of Act 106 of 1890.

But the following section qualifies the provisions of the former, thus:

“That from the day the said tax roll is filed in said mortgage office it shall act as a lien upon each specific piece of real estate thereon assessed, which shall be subject to a legal mortgage after the 31st day of December of the current year,” etc. Sec. 33 of Act 106 of 1890.

Consequently, plaintiffs' property is subject to the *lien*, if not to the legal mortgage of the statute—their deed of sale having been recorded on the 19th of July, subsequent to the filing of the assessment roll.

Judgment affirmed.

No. 11,445.

CORNELIUS C. BEARD VS. PETER LUFRIU.

Although the defendant in a proceeding for confiscation had no power of alienating the reversion or remainder which was still in him after the confiscation and sale, still an alienation of it by him, by a deed of warranty, accompanied by a covenant of seizin, or delivery of possession on his part, estops him, and

46 8.5
52 322
52 323
52 326
52 330

Beard vs. Lufriu.

all persons claiming under him, from asserting title to the premises, or against the vendee or grantee, or his heirs or their assigns, or from conveying it to any other person whosoever.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

F. L. Richardson Attorney for Plaintiff and Appellee:

The effect of the general amnesty proclamation in 1868 was to restore the citizen who had taken sides in the late Confederacy to the right of disposing of his interest in his confiscated property as completely as if never taken from him. *Bosworth vs. the Illinois Central Railroad Company*, 138 U. S. 192.

There was no change in the Federal jurisprudence on the subject, and the question had not before been presented. *Jenkins vs. Collard*, 145 U. S. 546.

An heir holds by no better title than his ancestor. *Griffin vs. Blanc*, 15 An. 5.

An act of partition between co-heirs not sufficient to show possession in good faith from the vendee of the heir. *Brown vs. Brown*, 15 An. 169.

A mistake in the application of the law to well known fact will not relieve a purchaser, even though he takes under legal advice. *Dohan's Heir vs. Murdock*, 41 An. 494.

An adjudication completes the sale. 6 La. 550; 10 An. 26; 12 An. 335.

Chas. F. Claiborne Attorney for Defendant and Appellant:

Up to and including the year 1886, the jurisprudence of the United States Supreme Court was that a judgment of condemnation and a sale under the confiscation act divested the confiscatee of a life estate or usufruct in the property sold, and deprived him of the exercise of any right of ownership over the naked ownership of the same; and that, at his death, both elements of ownership were united in his heirs. *Wallach vs. Van Riswick*, 92 U. S. 202; *Chaffraix vs. Shiff*, 92 U. S. 214; *Pike vs. Wassell*, 94 U. S. 711; *French vs. Wade*, 102 U. S. 132; *Avegno vs. Schmidt*, 118 U. S. 293.

Beard vs. Lufriu.

And that this incapacity to exercise the rights of ownership over the property confiscated by sale or will was not removed by a pardon or amnesty. 91 U. S. 21, *Semmes vs. United States*; *Knote vs. United States*, 95 U. S. 149; 4 Wall. 333, 380; *Confiscation Cases*, 20 Wall. 92; *Wallach vs. Van Renswick*, 92 U. S. 202, 213 214.

The Supreme Court of the United States changed its ruling upon these questions in the year 1889. *Illinois Central Railroad vs. Bosworth*, 133 U. S. 92; *Jenkins vs. Collard*, 145 U. S. 552.

But this change of ruling can not affect one who acquired rights under the pre-existing jurisprudence. Because the interpretation by the judiciary of a particular statute becomes a part thereof, and rights acquired thereunder are vested rights which can not be divested by a subsequent change of jurisprudence. 10 An. 122; 37 An. 55; 40 An. 500; 2 Black (U. S.) 603; 16 Howard (57 U. S.) 432; 1 Wall. 175; 4 Wall. 270; 9 Wall. 477; 19 Wall. 678; 105 U. S. 294; 101 U. S. 677, 687; 116 U. S. 361; 109 U. S. 105; 16 Wall. 684.

A possessor in good faith is entitled to be "reimbursed the expenses he may have incurred on it," or "a sum equal to the enhanced value of the soil." C. C. 3453, 3416, 508, 500.

In a petitory action plaintiff must show title in himself and in his author. 15 An. 169.

The opinion of the court was delivered by

WATKINS, J. This is a petitory action, and the only question for the court to decide is, which has the better title to the property in dispute—the plaintiff or defendant.

The judge *a quo* gave judgment in favor of the plaintiff in respect to the property, rejecting his demand for rents and revenues antecedent to the institution of the suit, and giving the defendant judgment against the plaintiff for the sum of one thousand three hundred and seven dollars and twenty-five cents on his reconventional demand for betterments, and allowing him to retain possession of the property until this allowance shall be paid.

From that judgment the defendant has appealed, and the plaintiff and appellee answers the appeal, and, denying that the defendant and appellant was a possessor in good faith, prays an amendment of the judgment appealed from, so as to condemn him to pay rents and revenues during the term of his possession.

Beard vs. Lufriul.

Inasmuch as the appellee, in his answer to the appeal, does not ask a revision of the judgment in respect to the amount allowed the defendant for improvements, it is fair to assume that he is contented therewith. Hence there are but two questions for us to deal with, namely: (1) title *vel non* in the plaintiff; (2) bad faith *vel non* in the defendant.

The plaintiff's chain of title to the property in suit is as follows, viz.:

1. By a conveyance from John Arrowsmith to H. M. Hyams on the 7th of January, 1854.

2. By certain proceedings and judgment of the United States Circuit Court against H. M. Hyams, confiscating his property under the act of Congress of date August 6, 1861, and an adjudication by the Marshal of the United States to Jotham Potter on the 18th of May, 1865.

3. By a conveyance from Jotham Potter to H. M. Hyams on the 3d of February, 1866.

4. By a conveyance from H. M. Hyams of three-fourths undivided interest to his son, Isaac S. Hyams, on the 4th of May, 1866.

5. By a conveyance from Isaac S. Hyams to the plaintiff, C. C. Beard, of said three-fourths interest, in act of partition and exchange of date June 4, 1870. And in his petition plaintiff alleges that he derived title "from Isaac S. Hyams by act of partition and exchange passed before E. Barnett, late notary, on the 4th of June, 1870"—the act last described.

The defendant's title is derived through a judicial partition in kind amongst the heirs of H. M. Hyams, on the 3d of January, 1885—the latter having died on the 25th of June, 1875—and, in the partition, the lot containing the property in dispute was drawn by Ingram R. Hyams. And on the 20th of February, 1886, Ingram R. Hyams conveyed the property to the defendant.

The question for decision is, whether the plaintiff's title from *Isaac S. Hyams* is better than the title the defendant derived from *Ingram R. Hyams*—both titles being derived from H. M. Hyams as a common author; and Isaac S. and Ingram R. Hyams being heirs of H. M. Hyams.

In the defendant's answer it is alleged that Isaac S. Hyams never had any title to transfer to the plaintiff; and that, in consequence of the confiscation proceedings against H. M. Hyams, and the adjudica -

Beard vs. Lufrul.

tion thereunder, "there was not left to said H. M. Hyams any interest of any kind which he could convey as he did, but that the ownership of said property reverted to the heirs of H. M. Hyams at his death," etc. The defendant's counsel cites and relies on the following decisions of the Supreme Court as sustaining his view, viz.: *Wallach vs. Van Riswick*, 92 U. S. 202; *Chaffraix vs. Shiff*, 92 U. S. 214; *Pike vs. Wassell*, 94 U. S. 711; *French vs. Wade*, 102 U. S. 182; *Avegno vs. Schmidt*, 113 U. S. 298.

That such was the theory entertained by counsel who had charge of and conducted the proceedings in the partition of the H. M. Hyams property, there can be no doubt, as it appears from the face of the proceedings themselves; but the Supreme Court has expressed a different opinion, in a case more recently decided than either of the cases referred to—*Jenkins vs. Collard*, 145 U. S. 547.

That case, like the instant one, was an action of ejectment, brought by the heirs of Jenkins, the confiscatee, for the recovery of the property which was confiscated, and the life estate in which had been sold, and of which (property) the defendant, Collard, became the possessor, during the lifetime of the confiscatee, plaintiffs alleging they had become seised of the legal estate in the premises by reason of the death of their father, and entitled to possession. The facts of that case seem to have been, that in 1863 all the estate of Jenkins was confiscated and sold to Bepler, who afterward conveyed to the defendant, Collard, to whom Jenkins subsequently made a formal deed of conveyance, on the 26th of August, 1865. On this state of facts, the Circuit Court held that only the technical life estate of Jenkins was confiscated by the decree of the court in 1863, "but there was left in him the reversion or remainder which he sold and conveyed to the defendant, by deed of August 26, 1865, and that consequently the plaintiffs had no interest in the property."

The Supreme Court, in passing upon this question, examined and carefully reviewed all of their previous utterances in reference thereto, and announced their adherence to the doctrine, that a confiscation sale only disposed of the life estate of the confiscatee, but at the same time held that Jenkins' deed to Collard, of August 26, 1865, operated as an estoppel against him, and all persons under him, from claiming title to the property sold as against the grantee and his heirs and assigns, or against his conveying it to other parties.

The court gave effect to the conveyance, made by the confiscatee

Beard vs. Lufui.

subsequent to the confiscation sale, and several years antecedent to the President's amnesty proclamation, on the authority of *Van Rensselaer vs. Kearny*, 11 Howard, 297, and *Irvine vs. Irvine*, 9 Wallace, 617. That decision is exactly applicable to the case at bar—the purchaser at the confiscation sale having executed a reconveyance to the confiscatee, H. M. Hyams, soon after the adjudication, and H. M. Hyams having executed a conveyance to his son, Isaac S. Hyams, on 4th of May, 1866, prior to the amnesty proclamation. The following quotation from the opinion of the court in that case will be interesting and instructive, viz. :

“Of the reversion or remainder of the estate of the offending party no disposition was ever made by the government. It must therefore be construed to have remained in him, but, under the ruling in *Wallach vs. Van Riswick*, without any power in him to alienate it during his life. That disability was enforced when he (Jenkins) executed, with his wife, the deed of the premises August 26, 1865. The proclamation of pardon and amnesty was not made by the President until December 25, 1868. *This deed, however, was accompanied with a covenant of seisin on his part, and that he would warrant and defend the title against the lawful claims of all persons whomsoever.* Admitting that he had no *present* estate in the premises and none in expectancy, he was at liberty to add to his deed the ordinary covenants of seisin and warranty, and *the same legal operation upon future acquired interests must be given to them, as when accompanying conveyances of parties whose property has never been subject to confiscation proceedings.* “*That warranty estopped him and all persons claiming under him from asserting title to the premises against the grantee and his heirs and assigns, or conveying to any other parties.* “When, subsequently, the general amnesty and pardon proclamation was issued, the disability, if any, that had previously rested upon him against disposing of the remaining estate, which had not been confiscated, was removed, and he stood, with reference to that estate, precisely as though no confiscation proceedings had ever been had. “The amnesty and pardon in removing the disability, if any, resting upon him respecting that estate, enlarged his estate, the benefit of which enured equally to his grantee. The removal of his disabilities did not affect the purchaser's right under the decree of confiscation. *The latter remained in the full enjoyment of the property during the life of the offending party, but he had no claim upon the*

 Heard vs. Lufrui.

future estate, nor did the heirs of the offending party have any such claim upon it as to preclude the operation of any previous warranties by him respecting it." (Our italics.)

We have italicized the portions of the opinion that have particular pertinence to the case before us—the deed from H. M. Hyams to Isaac S. Hyams, of date May 4, 1866, being prefaced with the declaration that the said vendor did "grant, bargain, sell and convey * * * with all legal warranties, and with substitution and subrogation to all his rights and actions of warranty," etc.

Following the authority of that case—and it is unquestionably authoritative—the conclusion is clear that the warranty clause in the deed of H. M. Hyams to Isaac S. Hyams operated as an estoppel upon the heirs of H. M. Hyams—notwithstanding the fact the deed was executed antecedent to the President's amnesty proclamation of December 25, 1868—and effectually bars their claim of title by inheritance, and likewise their assignee or vendee.

The subsequent general amnesty which relieved the confiscatee of the disability that rested upon him, placed him in exactly the same position he would have occupied with reference to the property, had no confiscation proceedings been had; but the benefit of the relief enured equally to his vendee and those holding under him. So that, at the death of H. M. Hyams, his warranty title to Isaac S. Hyams operated against his heirs and their assigns and defeats recovery by either. Of all the cases the Supreme Court has decided, not one is so completely apposite to the case at bar as *Jenkins vs. Collard*. The material distinction between that case and *Railroad Company vs. Bosworth*, 133 U. S. 92, is that the act of sale that Bosworth executed to the railroad company was dated in September, 1871—several years after the issuance of the President's amnesty proclamation; but the case of *Wallach vs. Van Riswick*, 92 U. S., is quite similar in principle to the instant one, in that the confiscatee became the purchaser at the confiscation sale in 1863, and made a conveyance to Van Riswick, the defendant, on the 3d of February, 1866. Of the title in that case the court said:

"It has been argued that the proclamation of amnesty, after the close of the war, restored to Charles S. Wallach his rights of property. The argument requires but a word in answer. Conceding that amnesty did restore what the United States held when the proclamation issued, it could not restore what the United States had ceased

Beard vs. Lufriu.

to hold. It could not give back the property which had been sold, or any interest in it, either in possession or in expectancy. *Semmes vs. United States*, 91 U. S. 21. Besides, the proclamation of amnesty was not made until December 25, 1868."

These three decisions are in line, and perfectly consistent, though dealing with different phases of the same subject. The conclusions at which we have arrived with regard to the effect of the conveyance from H. M. Hyams in 1866 render it unnecessary for us to give any extended examination into or discussion of, the intervention of H. M. Hyams in the act of sale from Isaac S. Hyams to the plaintiff on the 4th of June, 1870, for the purpose of relinquishing his rights of mortgage on the property sold. We may pass it with the simple statement that it has at least, the effect of confirming, after the removal of his disabilities, his contract of sale with warranty during their existence. With regard to the good faith of defendant, the following facts appear from the record, to-wit:

1. That he acquired the property by a deed that is translatif of property on its face, and which contains nothing on its face that tends to show any imperfections in the title of his author, or any illegality in the proceedings through which he acquired it.

2. That previous to his accepting title he employed a lawyer to examine it, and the lawyer pronounced it perfect and complete.

3. That his vendor acquired title by and through a judicial partition regularly made and duly homologated.

4. That under his deed he obtained possession, and has since retained it without question or complaint from any one, and has placed thereon valuable improvements.

We are of opinion that the principles of law announced on the subject of good faith in *Montgomery vs. Whitfield*, 41 An. 649, are strictly applicable, and bring this case under the operation of Arts. 503 and 3451 of the Civil Code.

The latter declares that "the possessor in good faith is he who has *just reason* to believe himself master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he *supposes* to belong to the person selling it to him, but which in fact belongs to another." The former declares that "he is a *bona fide* possessor who possesses as owner, by virtue of an act sufficient in terms to transfer the property, the defects of which he was ignorant."

It is quite apparent that the defendant had just reason to believe

Cooney vs. Ryter and Bank.

himself master of the property that he had purchased and of which he was placed in possession, although he was not in fact. He certainly acquired it by virtue of an act sufficient in terms to transfer the property, the defects of which he was ignorant. In *Montgomery vs. Whitfield* we said that Art. 503 "does not convey and was not intended to convey the idea that the defects of title might be made known to (a purchaser) from extraneous sources previous to the acquisition of the property, and thus deprive him of his good faith at the commencement of his possession."

The defendant's title does not rest upon the judgment of a court that is void for want of jurisdiction, or for the lack of citation, as in case of *Walworth vs. Stevenson*, 24 An. 251, and authorities cited. Nor is the nullity of defendant's title apparent from a simple inspection of it, as in *Dohan vs. Murdock*, 41 An. 494. We regard the defendant as a good faith possessor, and not bound for rents and revenues.

Judgment affirmed.

Rehearing refused.

Chief Justice Nicholls recuses himself, having been of counsel for some of the parties to the title in question.

No. 11,405.

JOHN COONEY VS. MRS. MARY RYTER AND WHITNEY NATIONAL BANK.

No one is presumed to have intended to make a donation.

In case a person makes a deposit in bank for the account of another, pursuant to a previous agreement, that, on a certain condition, the latter is to employ it for a designated purpose, and the former afterward calls for the restitution of said sum, before the fulfilment of said condition, he is entitled to have such custodian of the fund thus deposited respond to his call.

In case the claim of the respondent to such demand be, that an absolute donation of said sum of money was intended, he carries the burden of proving such donation by a fair preponderance of proof.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

J. J. McCann and Lazarus, Moore & Luce, Attorneys for Plaintiff and Appellee:

A gratuitous donation is never presumed; the presumption of law is against any such donation.

46	883
105	711
46	883
e119	156
46	883
e119	156

Cooney vs. Ryter and Bank.

The donor must reserve enough from his possession for a subsistence, and unless he does so, any donation made by him is a nullity. C. C. 1497; 11 Rob. 302.

Wynne Rogers and *B. Titché* Attorneys for Defendant and Appellant:

Plaintiff claiming on a loan can not recover by proving a deposit. 10 R. 92, *Bouché vs. Michell*.

The manual gift, that is the giving of corporeal movable effects, accompanied by real delivery, is not subject to any formality. C. C. 1539.

Money or a check may be the subject of a manual gift. 27 An. 200, *Succession of Hâle*; 27 An. 466, *Burke vs. Bishop*.

Where defendant is in actual possession of a sum of money and the plaintiff endeavors to recover that sum by alleging that she holds the same in trust for him, the *onus* is upon him to prove the trust. Failing to establish the trust as averred, he can not recover.

He can not be permitted, when the exigencies of the case require it, to prove that the sum of money which he averred to have been received by the defendant as a trust was, in point of fact, a donation; and to seek to annul that donation by showing that it should be revoked because it left him no means of subsistence.

The opinion of the court was delivered by

WATKINS, J. This suit has for object the recovery of two thousand five hundred dollars on deposit in the Whitney National Bank.

It appears that this sum of money was deposited by plaintiff for the account and in the name of his sister, Mrs. Ryter, the defendant, on or about the 29th of June, 1893, his contention being that this deposit was for safe-keeping, merely, during his temporary absence on a visit to California; while that of the defendant, Mrs. Ryter, is that it was an absolute donation to her; or, to employ the language of the plaintiff's petition, "that being unmarried, and without forced heirs, it was his purpose and intention to make provision, in the event of his death, for the children of his said sister,

Cooney vs. Ryter and Bank.

Mary Ryter, and that the deposit of the funds as aforesaid was made in view of petitioner's absence from the State as aforesaid. * * * That said Mary Ryter was fully advised of the purpose and intention of your petitioner and consented to allow the said fund to be deposited in her name, recognizing at all times that your petitioner was the owner of said fund and entitled exclusively to the use and disposition thereof."

Averring amicable demand without avail, the plaintiff demands possession of said fund and a decree recognizing him as owner thereof; and he prays for the maintenance of his writ of sequestration and the perpetuation of his writ of injunction. The defendant first pleaded a general denial, and subsequently amended her answer and specifically denied that she held this fund in trust, and, on the contrary, averred that the plaintiff had made her an absolute donation of it. On the trial there was judgment in favor of the plaintiff for the sum of two thousand five hundred dollars, less fifty dollars that had been checked out of bank by Mrs. Ryter; and the latter has appealed.

All parties admit that the relation of the Whitney Bank to the other parties to the suit is that of a mere stakeholder, and without interest in the result of the controversy.

Aside from the fact that the fund was deposited in bank by the plaintiff to the credit of the defendant, there is but little evidence which throws any light on the controversy, outside of the evidence of the parties to the suit; and the substance of the story of each is of like character, as their respective judicial declarations.

The following points are collated in the plaintiff's brief as those established by the evidence, and relied upon by him as showing that no gratuitous donation was intended by him, to-wit:

"The parties, though brother and sister, had not visited one another or been on speaking terms for several years, and they had no love nor affection for each other.

"That the plaintiff had not approved or liked the deceased husbands of the defendant.

"The plaintiff gave to the defendant, immediately before making the deposit in the bank, twenty dollars with which to purchase such necessities as she might need.

"The defendant asked permission of the plaintiff to draw on the amount deposited in case of necessity, and this permission was granted by the plaintiff after the deposit had been made.

Cooney vs Ryter and Bank.

"The defendant, according to her own testimony, had another source of revenue or livelihood, being the wages of herself and her children, from which her rent was paid and herself and family supported; and independent of this, she expected at the time to sell her house for two hundred and ten dollars. This was known to the plaintiff, and this amount of two hundred and ten dollars, in addition to her wages and the wages of her children, would, under ordinary circumstances, have supported them during the absence of the plaintiff.

"The alleged donation would have left the plaintiff virtually a pauper, and in case of sickness or accident he would be entirely dependent upon the charities of the world, or of a sister, for whom he had no love and affection, and who had none for him."

In addition to the foregoing, and which are substantially proven by the record, we find and extract from the record the following statements of the plaintiff, viz.: "Before I left I says to her, 'Mary, come with me to the bank, I want to put two thousand five hundred dollars in your name until I get back from California; but when I get back from California I will try and buy a piece of property to put you and the children in, to keep you from paying rent.' She went to the bank and I pulled out the twenty-five one hundred dollar bills and handed them to the clerk of the bank," instructing the bank official to put it in the name of his sister, Mrs. Ryter, the defendant. Coupled with this statement is the positive declaration of the witness that he never *gave* the money to his sister, but that *she was to hold it for him in trust until his return from California.*

Again, the plaintiff states that he went with his sister to a real estate agent, the latter introducing him, and he said: "I am glad you are selling that house of hers (Mrs. Ryter's) because she has never been able to pay any taxes or insurance upon the place; and it was more an incumbrance than a benefit to her. And I told him in the presence of her that if he would negotiate to buy but one of those four corners, that I would buy it and put my sister and her children in it." He says the sum of one thousand eight hundred dollars was named.

Again, this witness states that he told his sister, that when he returned from, California he would try and get her a house and give her a chance once more to make a living for herself and children; and that he offered her "a couple of hundred dollars, if she got the

Cooney vs. Ryter and Bank.

grocery, to buy a stock." He further states that he said when he returned from California he would buy a piece of property and put her and the children in it.

The following question and answer puts the plaintiff's view of the case very clearly:

" Q. Why was the money placed in the name of your sister—for her or your protection?"

" A. I put it in her name (so) *that if I would get killed she would be the owner of it.* It was my money. When I would get back I was supposed to draw it out and buy a house and put her in it."

" Q. Did you intend to give her that house if you put her in it?"

" A. No, sir; because she had a house taken away from her—sold for debt."

" Q. Did you make a donation of the two thousand five hundred dollars, involved in this controversy, to your sister?"

" A. Give it to her?"

" Q. Yes."

" A. No, sir; no, sir; oh, no!"

* * * * *

" Q. Did you give your sister authority, when you deposited that money in bank in her name, to draw out any part of that money?"

" A. Never. Only in case of sickness or death. I told her she could draw only on that condition; and if Mr. Danziger could purchase that piece of property, for her to give him a couple of hundred dollars to bind the sale, and when I got back I would attend to the rest."

One of the defendant's witnesses confirms the story, in reference to the plaintiff's contemplated investment in property, in which his sister and her children were to live—that "he would fix up to pay her debts, and she would be on top again."

The only material difference there is between the statements of the plaintiff and defendant, consists in the fact that the *former* insists that the money was only entrusted to the latter to be ultimately employed in purchasing a house for the use and occupancy of the latter and her children, while the latter contends that the money was *actually given* to her to enable her to buy a home for herself and children.

She states what she conceived to have been the exact words of the plaintiff, thus:

Schmidt & Ziegler vs. Ittman et al.

" Q. What were his exact words when he spoke to you about giving you this money? "

" A. The exact words were (that) this money was to buy a place, and in case of want I could draw and use it. These were the last words I asked him, when he was going away. I says, 'In case I would want money * * * can I draw on that money and use it?' He says, 'Certainly.' "

The foregoing is, substantially, all the testimony in this record on the matter in dispute, and, in our opinion, it fully confirms the correctness of the conclusions of the district judge.

Judgment affirmed.

Rehearing refused.

No. 11,452.

SCHMIDT & ZIEGLER VS. G. B. ITTMAN ET AL.

The plaintiffs sued on open account and alleged that the account had been acknowledged by promissory notes.
The defendants severed in their defence.

A PARTNER.

One of the defendants contended that he was not a partner.

PLEA OF INSANITY.

The executrix representing the succession of the other defendant contended that he was not sane at the time the goods were bought, and subsequently when the notes were furnished.

BILL OF EXCEPTIONS.

By the first (the surviving partner) objection was made to the admissibility of evidence, as to him, on the ground that it was an attempt to hold him for another person's debt, and that the open account had been novated by the notes in question.

The partnership was sued, and from it the amount due was claimed. The notes were furnished by the partnership. Evidence was admissible to prove that the defendant was not a third person, but a *partner*.

EVIDENCE OF PARTNERSHIP.

There was a partnership formed many years ago between the two brothers.
At the time stipulated in the formal act of partnership, for ending the partnership, it does not appear to have been dissolved.
The property, under the formal act of partnership, was the joint property of the partners.
It is not satisfactorily established that the joint ownership was dissolved.

Schmidt & Ziegler vs Ittman et al.

The property in which the partnership business was conducted was leased to the defendants jointly. The partner who defends on the ground that there was no reconduction of the partnership, obtained extension for the payment of the partnership debts. His active management and control of the business were such as to create the belief, on the part of others at the place of business, that he continued as a partner.

The amounts he has drawn and the acknowledgments indicate a continuous partnership business.

THOUGH NOT KNOWN TO CREDITOR.

The partnership being established, the principle applies that, whenever one is a partner, he is responsible for the debts of the partnership, though it may not have been known by the creditor that he was a partner.

PLEA UNTIMELY FILED.

The other defendant, the executrix, was without right to raise an issue of fact, by pleading it after the case has been argued and submitted for decision.

The issue is passed upon on the plea of general denial, originally interposed.

FACTS NOT NOTORIOUS OR KNOWN TO CREDITOR.

It is not proved that the defendant, who died since the suit was instituted, was insane at the times the goods were bought. If he was insane, it was not a notorious fact. It is not shown that the plaintiffs were aware of any insanity on his part. The fact of insanity became known at the date the notes were furnished. They are of no avail, valueless, and plaintiff is without right to charge him with the price of goods sold to him on the day the notes were executed and goods sold subsequent to that date.

The judgment appealed from is amended by deducting the price of the goods sold on the dates just stated.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

W. S. Benedict and H. C. Cage Attorneys for Plaintiffs and Appellees:

No amendment can be admitted after the case has been tried, argued and submitted. 11 R. 418; 12 An. 116.

A supplemental and amended answer alleging insanity filed under these circumstances was properly stricken from the record on motion of the plaintiffs, although it was styled a peremptory exception.

Where the affairs of a firm are managed by one of the partners under a power of attorney, goods sold and delivered to the firm on his orders and used and consumed in the firm's business must be paid for, although one of the members of the firm was insane at the time.

Schmidt & Ziegler vs Ittman et al.

Although one of the members of the firm be insane, the partnership continues. It is his interdiction which dissolves it. C. C. 2876, 2883.

Commercial partners are bound *in solido* for the debts of the partnership. C. C. 2872.

The secret partner is equally liable with the publicly avowed partner. 30 An. 640.

James J. McLoughlin Attorney for Succession of Geo. B. Ittman, Defendant and Appellant:

Where defendant has offered no evidence whatever, and where plaintiffs have offered without restriction the record of another suit to which defendant was a party, the plaintiffs are bound by all the facts disclosed therein and will not be permitted to deny their verity. 39 An. 1089, *Kallman vs. Creditors*.

When plaintiffs themselves offer evidence which discloses the fact that a deceased defendant was insane and incapable of contracting at the time they contracted with him, it is permissible for the executrix of the succession, after the evidence is in, to file a peremptory exception based upon the facts disclosed by the plaintiffs' testimony, and such exception is not an answer, but is a peremptory exception, admissible at any time before judgment is rendered. C. P. 346; 42 An. 735.

Such an exception does not raise new issues, for it rests entirely upon the facts put in evidence by the plaintiffs, and they are estopped by their own acts from objecting to the effect of their own testimony introduced without qualification.

One contracting with a person notoriously insane can not enforce the contract, even though the formal judgment of interdiction had not been pronounced at the time of the contract, if it be proven that the insanity which caused the interdiction existed when the contract was made. And it is sufficient for the purpose of Art. 402, C. C., to establish that this insanity was of such a nature that no one seeing and conversing with the party could be deceived as to his condition. *Fuzier-Herman*, An. Code Civil, Vol. 1, 609, paragraphs 8, 12, 13; 32 An. 91; 32 An. 170.

One who has accepted notes in settlement of a debt, and has credited same on his books as a settlement and has protested one of

the notes, has novated the debt and can not repudiate such settlement and sue on the open account as it existed before the notes were given. Hennen's Digest, authorities quoted, "Novation;" II., 3, page 994, new edition.

An insane person can not be held as a partner in an establishment under articles which expired many years prior to his insanity, and in the management of which he took no part during his insanity, and from which neither he nor his estate derived any benefit.

Henry P. Dart Attorney for Jacob Ittman, Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. Plaintiffs brought this action to recover the sum of two thousand two hundred and forty-six dollars and seventy-one cents and interest, they claim as due by the defendants, who are, they allege commercial partners.

They aver that it was for goods and merchandise sold by them to the defendants.

They declared upon an account and alleged in their petition, that in recognition of their indebtedness the defendants had furnished them with a number of notes, maturing at intervals of thirty days, which remain unpaid.

One of the defendants, George B. Ittman, had been interdicted at the date suit was brought. His curator was cited as party defendant.

After suit had been instituted, this defendant died. His daughter, as testamentary executrix of his estate, was made defendant.

Each defendant pleaded a general denial. They separated in their defence.

No evidence was offered by the executrix.

The other defendant defended on the ground that he was not a partner, and offered evidence to prove that he was not responsible for the debts, as he was not, he contended, a member of the firm sued.

The testimony discloses that in January, 1881, the two brothers, George B. and Jacob, formed a partnership to end on October 31, 1882. It was not expressly renewed at the end of the term stipulated.

Schmidt & Ziegler vs. Ittman et al.

The style of the firm under the contract of partnership was George B. Ittman, and the plaintiffs contend that the partnership continued by tacit reconduction, and that the goods, the price of which they sue for, were sold to a commercial firm of which George B. Ittman and Jacob Ittman were partners; that they were used by the firm in operating a barroom.

In the formal articles of partnership, it is stated that Jacob was the owner of one-half of the interest in the business, stock, fixtures, and appurtenances.

He put in the concern an amount stated, and thereby acquired a half interest.

The records do not show that there ever was a final settlement made between the partners, and that the firm was dissolved at the time for its dissolution stipulated in the written agreement of partnership.

The business was conducted during all the years succeeding the stipulated term of the partnership as it had been conducted originally under the formal contract.

The prominent facts showing the continuance of the partnership are, that the property in which the partnership business was conducted was leased by the partners jointly.

That in a matter of bank accommodation Jacob Ittman represented himself as one of the partners, and as a partner obtained an extension of time for payment; that the debits and credits of the partnership accounts were kept, as they had been kept under the formal articles of partnership, and that Jacob Ittman received his portion as a partner; that he on different occasions acknowledged his interest as a partner.

After the sickness of his brother in 1892, he had entire charge of the business, to the date of his brother's interdiction in June, 1893.

All the testimony, except his own, shows that his management was that of a partner.

His statement regarding the character of his management is not only contradicted by witnesses, but is inconsistent with the history of the business, as made manifest by the books of the firm.

The evidence of plaintiffs consists of their accounts sued on, and the notes signed by the defendant firm.

They also offered the interdiction proceedings in the suit in which one of the defendants was interdicted.

Schmidt & Ziegler vs. Ittman et al.

The note of evidence was closed, and after argument of counsel for both plaintiffs and defendants, the case was taken under advisement by the court.

While it was under advisement, the executrix filed a supplemental and amended answer and peremptory exception, in which she alleged, in substance, that plaintiffs could not recover on their accounts, for they held notes which had been introduced in evidence, and that these notes had been signed by the late George B. Ittman, after he had become notoriously insane; also that he was thus affected at the times (previous to the execution of the notes operating an acknowledgment) the goods, described in the open accounts, were sold and delivered.

On plaintiff's motion, averring that it was not a peremptory exception, but an amended and supplemental answer, it was treated as of no effect and excluded from the record. The District Court pronounced judgment for the plaintiffs and against both defendants *in solido*.

From the judgment both defendants have appealed.

BILL OF EXCEPTION.

The defendant Jacob Ittman, through his counsel, argues that the notes were signed by George B. Ittman, and that there is no allegation that they were taken in error, that the suit was brought against the defendants as commercial partners.

He invites attention to the fact that, at the opening of the case he interposed the objection that, upon the face of the papers, it was an attempt to hold the defendant Jacob Ittman for another person's debt, and that the open account had been novated. That this objection was overruled and a bill reserved.

Had the evidence supported the contention that Jacob Ittman was not a partner and that he was only an employé, the points urged would be unanswerable. The testimony leaves that theory of the defence unsustained by the facts. There was no error committed in admitting the testimony offered to prove that a partnership existed, and in not sustaining the plea of novation urged as an objection to the admissibility of the testimony.

THE EXISTENCE OF THE PARTNERSHIP.

At the risk of some repetition, we resume a statement of the facts regarding the partnership, as follows:

Schmidt & Ziegler vs. Ittman et al.

There was a partnership originally in the name of George B. Ittman.

This is undisputed.

The property belonged to the partners in equal shares.

There was no settlement of the partnership.

The partner Jacob Ittman obtained extension of time for payment of partnership debts.

Those near him, occupying desks in one of the apartments occupied in conducting defendants' business, looked upon him as a partner, because of his active management and control of the business.

He has actively and interestedly attended to the business of the partnership. He has drawn amounts from the partnership funds, not consistent with his statement that he was an employé.

His signature in one of the books in evidence, together with that of his brother and copartner, at the end of the statements of amount received, indicate, not a receipt for wages, but an agreement between partners as to amounts received by one of them from the partnership funds.

MAY HAVE BEEN UNKNOWN AS A PARTNER AND YET RESPONSIBLE.

With reference to the knowledge of the creditors.

The responsibility of a partner may exist, though it was not known by the creditor that he was a member of the partnership.

Whenever the parties intend a partnership between themselves, they are, or at least may be held to be, partners as to third persons. Story on Partnership, Sec. 49.

The existence of a dormant partner may be unknown to the creditor, and yet he may be held liable to the extent of his responsibility as a partner. Lindley on Partnership, Vol. 1, p. 339.

The secret partner can escape liability only by the failure of the creditors to discover the relation he holds to the business. Chafraix & Agar vs. Lafitte & Co., 30 An. 631.

Commercial partners are bound *in solido*. They were commercial partners and bound for the payment of the debt.

AN ANSWER INVOLVING ISSUE OF FACTS FILED TOO LATE TO BE CONSIDERED.

The other defendant, the executrix, could not be heard to raise an issue of fact after the case had been argued and submitted for decision.

Schmidt & Ziegler vs. Ittman et al.

The question of insanity, *vel non*, of the late George B. Ittman at the time the debt was contracted, was purely one of fact, and if the executrix desired to avail herself of that defence, it should have been seasonably presented.

But she contends that the record in the interdiction proceeding, introduced in evidence by plaintiffs without limitation, established more than the mere fact of interdiction and the appointment of a curator.

This manifestly was the purpose of plaintiffs in introducing this record.

The omitted limitation of the effect it should have is seized upon by the defendant as cause sufficient to enable her, some time after argument, to plead the absolute incapacity of the defendant at the dates the purchases were made.

We are compelled to decline all consideration of an exception tendered, going to the merits of the cause, on an issue of fact. It was really an answer. C. P. 419, 420; Boagni vs. Anderson, 32 An. 920; Cohn & Bruen vs. Levy, 14 An. 355; Guilbeau vs. Thibodeau, 30 An. 1099.

THE PLEA IS CONSIDERED UNDER THE GENERAL ISSUE.

This conclusion, however, does not exclude all consideration of the defence presented.

Had the plaintiffs, while proving their claim against this defendant, proved that he was notoriously insane, the executrix would have a right, under her plea, originally interposed, of general denial, to a judgment of non-suit.

THE EVIDENCE DOES NOT PROVE INSANITY AT THE TIME.

There is no proof of record that he was notoriously insane at the dates that the goods were sold to the defendant firm.

He became ill in October, 1892, and from that time his family seriously considered his mental condition.

It was only a short time prior to his interdiction that his mental condition became generally known.

THERE WAS NO NOTORIOUS CAUSE FOR INTERDICTION, NOR WAS IT PROVED THAT PLAINTIFFS KNEW OF ANY ABERRATION OF MIND.

It is announced in French jurisprudence, that acts anterior to the interdiction may be annulled, if there was notorious cause for in-

Schmidt & Ziegler vs. Ittman et al.

terdiction at their date. Cass., 11th of March, 1862, S. 63, T. 136, pp. 63, 634.

Proof of a notorious cause for interdiction must be made, in order to defeat payment of goods purchased at their value in due course of trade. Laurent, Vol. 5, p. 376.

In the two cases cited by counsel for the defendant (Fecel vs. Guinault, 32 An. 91; Lagay vs. Marston, 32 An. 170) the insanity was evident and the causes for interdiction well known to those who were parties to the contract annulled.

The records disclose an entirely different state of facts in the case at bar.

The mental condition of the sadly afflicted man was, so far as appears of record, a cause of concern and sorrow to the family, becomingly undivulged, until secrecy was no longer possible.

PRICE OF GOODS NOT ALLOWED, PURCHASED FOR BUSINESS, AFTER CREDITOR WAS AWARE OF INSANITY, ONCE CAUSE FOR INTERDICTION HAD BECOME WELL KNOWN.

The defendant, in argument, urges that plaintiffs sued on the notes they hold and not on their account. The fact is, that they declared on their account; that without defence or objection on that score, they proved the correctness of the account, and used the notes in corroboration of its correctness.

Had they brought action on the notes they would not have recovered, for the drawer was notoriously insane on the first day of June, 1893, the date they were made.

The insanity of George B. Ittman was notorious on the first day of June, 1893, and the fact known to the plaintiffs on that day.

The price of the goods sold to him and charged to his account on that, and days subsequent, can not, under the law, be recovered, and to that extent the judgment must be canceled, in so far as he is concerned.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by deducting the sum of ninety-eight dollars and forty-six cents from the amount of twenty-two hundred and forty-six dollars and seventy-one cents the executrix was condemned to pay, and that in all other respects it be affirmed, with costs of appeal to be paid by the plaintiffs and appellees, and those of the lower court as directed in the decree.

Solomon vs. Diefenthal.

No, 11,404.

M. W. SOLOMON VS. EDWARD DIEFENTHAL.

1. Where a party who sells his business and the good will thereof, contracts that he will not engage in the same business in the same place for five years, and stipulates, "that in the event of the violation of his engagement in whole or in part, the damages inflicted upon the purchaser, in consequence thereof, are liquidated and fixed at five thousand dollars, which he agrees to pay as a penalty for said violation, and consents that the purchaser shall restrain him by injunction, if necessary, from any attempt to violate said engagement, authorizing any court of competent jurisdiction to do so on application," his subsequent violation of the agreement will not entitle the other party to demand and obtain at one and the same time a judgment for five thousand dollars and an injunction.
2. Parties are much more free to make contracts than they are to stipulate for and regulate legal remedies.
3. Where a party sues for a personal judgment for five thousand dollars as the stipulated penalty, or the damages fixed and liquidated for a violation in whole or in part of a contract, not to do certain business for five years, and demands and obtains at the same time against the other party an injunction restraining him from pursuing such business as an instrumentality to enforce specific performance—the demand, as presented and filed with the two remedies coupled, is an entirety and an inequitable one. The injunction should not be allowed. If allowed it can not be made good *ab initio* by a subsequent offer to discontinue a part of the demand. A motion to dissolve the injunction was correctly sustained.

A PPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

Lazarus, Moore & Luce, Attorneys for Plaintiff and Appellant, cite: High on Injunction, Secs. 1138-9, 1175; Bird vs. Lake, 1 Hun. and Miller, 111; McCaull vs. Braham, 21 Blatch. 278; Hardy vs. Martin, 1 Cox' Eq. Cases, 26; Diamond Match Co. vs. Roeber, 106 N. Y. 486; 39 An. 904.

The precise question submitted by defendant in the instant case was tendered to and received decision from the Supreme Court of this State in Levine vs. Michel, 35 An. 1121, and ought to be, as we have no doubt it will be, determinative of this case.

Dinkelspiel & Hart, Attorneys for Defendant and Appellee, cite: C. C., Art. 1934, 2125; 38 An. 869; 23 An. 397; Field's Law of Damages, pp. 142-3.

46	897
47	934
<hr/>	
46	897
51	767
51	773
<hr/>	
46	897
113	454
<hr/>	
46	897
119	322
<hr/>	
46	897
119	322

Solomon vs. Diefenthal.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff and defendant were formerly partners as butchers in New Orleans. The present litigation is the result of the sale by the defendant to the plaintiff of all the former's interest in the business of the firm, in the stock in trade and all appliances and appurtenances thereof, including the tools, horses, wagons, good will, custom, patronage and certain enumerated contracts for the price of three thousand dollars, two thousand dollars of which were paid cash, and the balance represented by the purchaser's note, payable at six months.

The present suit was instituted in October, 1893. Plaintiff, after setting forth in his petition the above facts, alleges that in the contract it was further stipulated, as a part of the consideration for the price paid, that defendant was not to engage in any similar business, directly or indirectly, in the city of New Orleans, for the period of five years, nor was he to solicit business for himself or for any other person or persons, so engaged during the said period, defendant binding and obligating himself, in the event of the violation of said obligation, in whole or in part, to pay damages to the plaintiff, which damages were by said act fixed and liquidated at the sum of five thousand dollars, defendant agreeing to pay said amount as a penalty for any violation of the said stipulation, and that plaintiff should restrain him by injunction in any attempt to violate said agreement.

He further alleges that the interest conveyed by the defendant was worth much less than three thousand dollars, and that the main reason and consideration for the payment of the three thousand dollars was defendant's obligation not to engage in business or solicit orders, as before stated. He then represents that defendant had, on the 27th of September, 1893, violated this obligation by opening and establishing at stall No. 44, Dryades Market, in New Orleans, a place for the vending of fish, poultry, meats, etc., and had there sold the same, and would continue so to do unless enjoined. That by reason of the said conduct plaintiff had by law, and by defendant's express agreement, a right to restrain him from further conducting or pursuing the said business, directly or indirectly, and from soliciting, directly or indirectly, any trade or customers for that or any other similar business. That inasmuch as by the stipulations of the act of sale damages for the violation of said agreement are fixed and liquidated at the sum of five

Solomon vs. Dietenthal.

thousand dollars, plaintiff is entitled to recover that amount from the defendant. He prayed for the injunction to which he averred himself entitled, and for judgment in his favor for the sum of five thousand dollars, with legal interest from judicial demand.

An injunction was granted as prayed for, and was duly served upon the defendant.

On the 10th October, at the instance of plaintiff, defendant was ruled to show cause, on the 12th of the same month, why he should not be punished for contempt for having violated the injunction. On the same day (the 10th) defendant moved to dissolve the injunction on the ground that the petition showed no cause of action, and that the bond and security given for the injunction were insufficient. This motion was fixed for trial for the 12th. The rule for contempt and the motion to dissolve the injunction seem to have been taken up and tried together, the trial resulting in a judgment dissolving the injunction. From that action of the court plaintiff appealed. Subsequently to the taking of the appeal defendant died, and his widow and heirs having been made parties they have asked in this court an affirmance of the judgment.

Appellant insists, that believing he was entitled under his contract to ask, at one and the same time, both a judgment, for five thousand dollars by way of damages or penalty, and an injunction for the purpose of enforcing defendants' obligation not to engage in business, he had the right to frame his demand accordingly, though possibly in so doing he subjected himself to being forced to an election as to which of the two claims he would stand upon, should the court hold that this could not be done. He complains that the District Court by its action cut him off from a right and power of election which belonged to him, even if the two demands were inconsistent, and that the court itself made for him an arbitrary election which it was not authorized or warranted in making. He maintains before us that the two claims were not inconsistent, and that he can in the premises legally exact both a moneyed judgment and an injunction.

The matter as presented to the district judge was, on the one hand, the ordinary one of a demand for a personal judgment for a sum of money, coupled with an injunction, apparently accompanying it as an incidental remedy, and on the other a motion to dissolve that injunction on the face of the papers, for the reason that the petition showed no cause of action. This motion was the customary one

Solomon vs. Diefenthal.

employed in matters of injunction and the expression that the petition showed no cause of action had reference to it. The motion as made, called simply for an absolute decision, either maintaining the injunction or setting it aside. There was nothing to intimate to the judge that any right of election would be involved in his decision. Plaintiff did not suggest to the court that it should so frame its decree as to save a right of election. Possibly this might have been done, had the right of election now claimed really existed, by a conditional or contingent order of dissolution; but whether this be so or not, such a right or privilege is not shown by the record to have been mentioned or hinted at.

The court was probably of the opinion that the plaintiff by asking for a judgment of five thousand dollars was *ipso facto* in the position of having himself already forcedly made an election. It may also well be that an examination of the pleadings and prayer as a whole led it to the conclusion (injunction not being necessarily a writ of right) that the facts disclosed by the petition were of a character such as to bar the remedy of injunction, independently of the question of an election.

Defendants' position—sustained by the court below—is that plaintiff in proceeding against him, and asking for a judgment of five thousand dollars, abandoned any right which he might have otherwise had to an injunction.

We are of the opinion that plaintiff would have had the right to an injunction against defendant to enforce the obligation entered into by him in his contract, not to engage in business in New Orleans for a certain time. This court has so decided, in *Levine vs. Michel*, 35 An. 1121 and there are numerous common law authorities to the same effect.

Plaintiff concedes that he would take this remedy, not by virtue of any permission from the defendant, but from the law, and says he refers us to the express consent of the defendant to its exercise, as going to show the intentions of the parties and to fix and establish the character of the claim for five thousand dollars.

Referring to the defence made in the case as mentioned above, plaintiff, in his brief, says: "On this proposition the authorities are agreed that the test is the intention of the parties to the contract, to be gathered from the contract itself in its *entirety*. Thus, if it should appear that the intention of the parties to the contract was that upon

Solomon vs. Diefenthal.

the payment of a stipulated sum it should be permissive of the right to commit the breach, and that the stipulation to do or not to do may then be done or not done, as the case may be, then there can be no action for the stipulated damages and for the specific performance also. But if, on the other hand, the evident intention of the contracting parties, as gathered from the contract in its entirety, is that a specific performance of the obligation to do or not to do is the prime or moving object or cause for the contract, and that a stipulation of a 'penalty' for the breach was intended, not as a *measure of bad faith*, but as an inducement to good faith, an action will lie to recover the penalty and an injunction may go out to stay the action complained of."

We do not understand the defendant to assert that the contract, as made, created a facultative obligation *entitling him of right to recede from* his obligation not to engage in business upon payment of five thousand dollars, thus depriving plaintiff of any legal power of control over defendant's actions in that respect. Defendant sets up no such pretension. We take it that he perfectly well understood and recognized that in undertaking to open an establishment of his own, he did so in express violation of his obligation, and not under a conditionally reserved right, and that he well knew that he subjected himself to all the rights and remedies which would belong to the plaintiff as the result of that fact.

What we have to deal with now is the ascertainment of what those rights and remedies are. We have already said that he could have checked the defendant by injunction. If he thought proper not to do this, he was undoubtedly entitled to bring an action against him, demanding five thousand dollars damages as for breach of contract. But the question is, is he entitled in this case to do both. It may be true that there are cases where a primary obligation having been entered into, and a penalty stipulated to insure its performance, the obligee may properly sue for the penalty and also for the specific performance of the obligation; and also cases where a demand for the specific performance of an obligation may be legally coupled with a demand for liquidated damages resulting from its breach. We confine ourselves to seeing whether the present case falls within one or the other of those classes without attempting to discuss or define what those classes are.

In Art. 2125 of the Civil Code it is declared that "the penal

Solomon vs. Diefenthal.

clause is the compensation for the damages which the creditor sustains by the non-execution of the principal obligation. He can not demand the principal and the penalty together, unless the latter be stipulated for the mere delay," and in Art. 2127, that the courts are authorized to modify the penalty when the principal obligation has been partly executed, *except in case of a contrary agreement*.

The fifth paragraph of Art. 1934, C. C., referring to damages arising from breach of contract, says: "Where the parties by their contract have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is executed in part, the damages agreed on may be reduced to the loss really suffered, and the gain of which the party has been deprived, unless there has been an express agreement that the sum fixed by the contract shall be paid *even on a partial breach of the agreement*."

With these provisions of the law before us, let us refer to the terms of the special contract. The act between the parties referring to the obligation assumed by the defendant not to engage in business says:

"In the event of the violation of this obligation *IN WHOLE OR IN PART* the damages inflicted upon the purchaser or his assigns in consequence thereof, are hereby liquidated and fixed at the sum of five thousand dollars, collectible in any court of competent jurisdiction, and the vendor agrees to pay said amount as a penalty *for said violation*. He further consents that the purchaser shall restrain him by injunction, if necessary, for any attempt to violate said engagement, hereby authorizing any court of competent jurisdiction on the application of said purchaser and according to law."

In examining the clauses of this contract the words "in violation of this obligation *IN WHOLE OR IN PART*," which we have ourselves italicized, are specially noticeable. By the contract the sum of five thousand dollars was fixed as the damage which would be inflicted on the purchaser, or the penalty which would be imposed upon the vendor *independently of the extent or duration of the breach*, whether it should cover an hour, a day, or the whole five years during which this obligation was stipulated to continue. Let the time be long or short, let the actual damage be large or small, the parties contracted for the payment to the plaintiff of the sum of five thousand dollars, and withdrew from the courts a power of reduction or modification. By express agreement the bare fact of a violation of the obligation by

Solomon vs. Diefenthal.

the defendant entailed upon him a liability to pay plaintiff the full amount agreed upon.

Let us now turn to other articles of the Code relative to breaches of contract and see what their provisions are. We quote some of them in full, italicizing certain words, as we have already done in case of articles already copied.

Art. 1926. "On the breach of any obligation to do or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a *specific performance* of the contract at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued according to the rules established in the following section:"

Art. 1927. "In *ordinary cases*, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an adequate compensation, and the party has the power of performing the contract, he may be condemned to a *specific performance* by means prescribed in the laws which regulate the practice of the courts."

In *City and Levee Board vs. Railroad Co.*, 44 An. 87, this court said: "It is only when no adequate compensation can be made in damages that courts in this State can decree a specific performance of a contract. The decree can not be demanded as a matter of right. It rests largely upon judicial discretion not arbitrarily exercised, but according to the soundest principles of equity and justice."

The injunction which issued in this case was adopted as an instrumentality by and through which to enforce the "specific performance" of defendant's obligations, and the propriety of its issuance and its perpetuation must be viewed from that standpoint. Specific performance, as we have just seen, is not demandable as a matter of right, and under Art. 1927 it is not granted where the parties have provided for adequate compensation in case of breach. Such is precisely the condition of the parties to this litigation. They have themselves fixed upon five thousand dollars as being an amount sufficient to compensate plaintiff for a violation during the whole five years to which the contract refers.

If damages had been liquidated in the contract at so much per day, or per month, and plaintiff, at the end of two or three months, had sued defendant for the amount of the past due accrued and exigible damages, coupled with an injunction against further continued violation of his obligations, a very different case would

Solomon vs. Diefenthal.

have been presented than that which is actually before us. The contract between these parties was entered into on the 13th of July, 1892. The first infraction of the same by defendant is mentioned as having occurred on the 27th of September, 1893, and this suit in which plaintiff sued defendant for five thousand dollars and caused an injunction to issue against him, prohibiting him from engaging further in the business of butchering, was instituted on the 4th of October following—only seven days after the first violation by defendant of his engagement. If plaintiff, after taking out an injunction, had maintained it in force for one or two years, and had then voluntarily dismissed it, or discontinued it, he would still be entitled, under his contract, to a judgment for five thousand dollars, and defendant would be entitled to no credit, either for the period between the date of the contract and its first infraction, during which time his contract stipulations would have been observed voluntarily by him, nor credit for the enforced observance of those obligations, through the injunction, from the time of the issuing of the injunction up to that of its discontinuance.

We do not think such harsh and unreasonable results should be permitted to be brought about by the courts through a remedy which is discretionary with them in its application. The agreement of the parties in this matter is of no importance. Parties are much more free to make contracts than they are to regulate and stipulate as to the legal remedies. 15 An. 246.

The demand as presented and filed, with the two remedies coupled, was an inequitable one and an entirety, and the injunction should not have been allowed—it could not now be given life to and legalized *ab initio* by an offer to discontinue a part of the demand, even had such an offer been made, which it has not. This view of matters relieves us of any attempted classification of the obligation which the parties entered into from examining to see whether there is a difference between the liability of five thousand dollars provided for considered as a “penalty” and the same liability considered as “liquidated damages.” And if such there should be, to distinguish between the effects of the one and those of the other. Our judgment in this case would not be altered by reason of any distinctions of that kind.

Plaintiff informs us, the defendant is now insolvent and a judgment against him would serve no useful purpose. The possi-

Solomon vs. Diefenthal.

bility of defendant's future insolvency was a matter which should have been foreseen and guarded against by proper security—the plaintiff did not deem this security necessary at the time of the contract.

The case of *Stafford vs. Shortreed*, reported in 17 *Northwestern Rep.* 756, resembles the present in many of its features. In that case the Supreme Court of Iowa held, that "where a party who sells his business and the good will thereof contracts that he will not carry on the same business at the place of sale, or within a certain distance thereof for three years 'under penalty of one hundred dollars,' and violates this agreement, the only remedy is an action to recover the amount named in the contract, and in such an action an injunction to restrain the continuance of such business, in violation of the contract, can not be granted."

In that case, as in this, it was contended that the defendant was insolvent. The court said: "It is to be presumed that the plaintiff made his contract with full knowledge of defendant's financial standing and ability to discharge his obligations. If he had doubts upon that question he should have required some security to protect himself against any damages which he might sustain by reason of the failure to observe his agreement. As he took the defendant's promise to pay him one hundred dollars if defendant should violate his agreement, he can not ask more than the ordinary process of the law to enforce payment. The amount which the defendant agreed to pay is in the nature of stipulated damages. It can not be regarded as a penalty, because the actual damages which plaintiff may sustain by a violation of the agreement must, in the nature of things, be subject of mere conjecture. They can not be established by evidence even approximately. Section 3386 of the Code has no application to a case like this. It is therein provided that in all cases of breach of contract or other injury where the party injured is entitled to maintain and has brought an action by ordinary proceedings, he may in the same cause pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury * * * In this case there can be no repetition or continuance of a breach of the contract, because when the defendant commenced to work at blacksmithing at Pottsville he incurred the whole liability, which was to pay plaintiff the one hundred dollars."

We are of the opinion that the judgment appealed from is correct, and it is therefore hereby affirmed.

Palmes vs. Kuhn.

No. 11,489.

MARY R. PALMES VS. J. J. KUHN.

A paper in the nature of a counter letter to the effect that the person executing it has no interest in certain property apparently conveyed to her by authentic act is effective as a renunciation of title, and protects the purchaser acquiring the property from the party in whose favor the renunciation is made. Civil Code, Arts. 2239, 2240, 2242; 7 La. 151; 10 La. 411.

The appellant, in good faith, seeking in this court the determination of a question affecting his rights will not be made to pay damages, merely because the supposed questions admitted of easy solution without appeal.

A PPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

F. L. Richardson Attorney for Plaintiff and Appellee.

J. B. Rosser, Jr., Attorney for Defendant and Appellant.

The opinion of the court was delivered by

MILLER, J. Defendant appeals from the judgment of the lower court adjudging that he shall comply with the adjudication to him of certain property of plaintiff.

The defence is that the title tendered by plaintiff is not satisfactory. It appears that plaintiff once executed a deed of the property to her daughter. But soon after her daughter signed a paper to the effect she had no interest in the property, "waiving ownership of the same" and declaring the property is hereby returned to her mother. This paper is under private signature, but is proved and has been on record since 1887. This paper and a letter from an attorney of the sister of the daughter, to whom the mother once made the deed, asserting an interest in the property, is the basis of the defence. The sister, on whose behalf the letter was written, intervened in this suit, offered no proof in the lower court and filed no brief here. The paper or counter letter is none the less effective, because under private signature. Civil Code, Arts. 2239, 2240, 2242; 7 La. 151; 10 La. 411. The title tendered by plaintiff is hence incontestible. Besides, the heir of the daughter of the plaintiff, on whose

State vs. Courcier.

behalf the attorney's letter was written, being a party to this suit, is bound by the judgment and that protects defendant.

We are not disposed to encourage unnecessary appeals, but where the litigant in good faith comes to this court for the determination of questions affecting his rights, he should not, we think, be mulcted in damages, merely because the supposed questions admitted of easy solution without appeal. The case in our opinion is not one in which damages should be given.

It is therefore adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 11,399.

THE STATE OF LOUISIANA VS. DASYLVA COURCIER.

On appeal from a judgment of the Recorder's Court of the City of New Orleans finding a person guilty of having violated an ordinance of that city, and imposing upon the party charged, as provided for in the ordinance, a fine of twenty-five dollars, or on default of payment imprisonment for thirty days, the case is not before the Supreme Court generally, but only upon the restricted issue of the constitutionality and legality of the fine and penalty imposed by the municipality; therefore it can not, when that remedy is resorted to, examine into and pass upon the question as to whether the person who presided at the trial and rendered and signed the judgment was legally authorized so to do; for the same reason it can not grant relief when the complaint made by the accused is that under the charge as made, and the evidence as received, the judge has sentenced him, not under an illegal ordinance, but without the authority really of any ordinance at all, and therefore without warrant of law.

A PPEAL from the First Recorder's Court, City of New Orleans.
Adams, J.

M. J. Cunningham, Attorney General, and *C. H. & C. C. Luzenberg*, for the State, Appellee:

Ordinance No. 92, C. S., of the City of New Orleans, making it unlawful for any one to sell, barter, exchange, or otherwise dispose of any lottery ticket or token of any kind, is a legal and constitutional ordinance.

In appeals from convictions under City Ordinances the jurisdiction of the Supreme Court is confined to an examination and determination of the legality and constitutionality of the City Ordinance under which the said fine or imprisonment was imposed. With the affidavit and the facts set forth in it, and with the evidence

46	907
46	1407
46	907
47	647
46	907
49	451

State vs. Courcier.

in the case on which the Recorder founded his judgment, the Supreme Court has nothing to do.

Any one of the Recorders *pro tem.* can preside over any Recorder Court of the City of New Orleans in the event of sickness, absence, or suspension of the Recorder.

If an agent of an illegal lottery company pays the prize drawn by an illegal lottery ticket for the said illegal lottery ticket, the said agent "disposes" of said illegal lottery ticket under Ordinance No. 92, C. S.

Lionel Adams made oral argument but filed no brief.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, charged with having violated an Ordinance of the City of New Orleans, was tried in the First Recorder's Court of that City, found guilty and sentenced to pay a fine of twenty-five dollars, or, in default of payment of said fine, to imprisonment in the parish prison for the term of thirty days. The trial was conducted before and the judgment rendered and signed by Samuel Levy, signing himself acting judge of the First Recorder's Court of New Orleans. The defendant has appealed.

The affidavit on which he was arrested charges "that on the 16th day of October, 1893, at about — o'clock —. M., on Baronne street, between Gravier and Union streets, in this District and City, one to be pointed out, did then and there violate Ordinance No. 92, C. S., relative to illegal lottery tickets, by cashing or paying a prize supposed to be drawn by a ticket of an illegal lottery company," wherefore deponent charges the accused with violating Ordinance No. 92, C. S., and prays that he be arrested and dealt with according to law.

The affidavit was taken before T. R. Adams, signing as Assistant Recorder.

Before trial defendant pleaded (1) "That Samuel Levy, a resident of the Fifth District of the City of New Orleans is not competent to sit and act as a Recorder *pro tem.* in and for the First Recorder's Court for the City of New Orleans; (2) Because the affidavit sets out no offence known to the law."

The Court overruled these pleas, and defendant excepted to the ruling.

Ordinance No. 92 referred to is as follows:

1. That it shall be unlawful for any person or persons to sell, barter, exchange or otherwise dispose of any lottery ticket, or token, policy, combination, device, or certificate, or fractional part thereof, in any lottery drawn, or to be drawn in or out of the city of New Orleans, unless the same be duly authorized by the laws of the State of Louisiana.

2. That any person or persons violating the provisions of this ordinance shall, upon conviction before the Recorder within whose jurisdiction the offence was committed, be condemned by said Recorder to pay a fine of twenty-five dollars for each offence, and, in default of payment, to imprisonment for not less than twenty nor more than thirty days.

In the judgment appealed from it is declared that "considering the evidence adduced and the provisions of Ordinance No. 92, C. S., the Court adjudges the said Dasylla Courcier to be guilty of having, on the 16th of October, 1893, on Baronne street between Gravier and Union streets, violated Ordinance No. 92 relative to illegal lottery tickets, by cashing or paying a prize supposed to be drawn by a ticket of an illegal lottery company."

Defendant urges upon us that we should reverse the judgment for the reason that Samuel Levy, who presided at the trial, was not competent to sit and act as a Recorder *pro tem.* in and for the First Recorder's Court for the City of New Orleans, he being a resident of the Fifth District of the City of New Orleans.

Assuming this exception to be well founded in law and fact, we would not be authorized in this proceeding to so declare. This case is before us on appeal, not generally, but on the special restricted issue of "the constitutionality and legality of the fine, forfeiture or penalty of a municipal corporation." We can not extend our inquiries beyond that issue. This Court reversed the judgment of the District Court in two criminal cases—State vs. Phillips, 27 An. 663, and State vs. Fritz, Id. 689—upon an assignment of error involving the competency of the person who presided as judge on the trial of those cases, but the Supreme Court had full and complete appellate jurisdiction over them for all purposes.

Defendant next contends that the judgment should be reversed for the reason that the affidavit on which he was tried sets out no offence known to the law, but that, if the ordinance was intended to

State vs. Courcier.

and did, as a matter of law, by implication prohibit the act complained of against the defendant, in that respect the ordinance was null and void, for the reason that the purpose of the Common Council was not disclosed by the prohibitions of the ordinance, and that the object of the ordinance was not set forth either in the title or in its enacting clause, and that therefore defendant was deprived of his constitutional right to be informed of the nature and cause of the accusation against him.

This same objection was interposed in the Recorder's Court, after the case was tried but before judgment was rendered therein.

In the brief for the prosecution the title of the ordinance is said to be "An ordinance for the purpose of carrying out the provisions contained in paragraph 12 of Sec. 8 of the present City Charter," though the copy in the record is headed "Unlawful Sales of Lottery Tickets." Whether it be one or the other, we think the objection which defendant contingently raises as to the title not well founded. We know of no law extending the provisions of Art. 29 of the Constitution so as to make them cover municipal ordinances.

We do not think that the questions which the defendant seeks to have this court pass upon can, as presented to it in this case, be adjudicated upon.

The affidavit charges the defendant with having violated Ordinance No. 92, O. S., and accompanies or bases the charge upon specifications set out. The sufficiency of the affidavit is not before us. As matters stand, the complaint of the defendant is not that the ordinance itself is illegal or unconstitutional, but that the Recorder has made the ordinance apply to a case outside of the terms thereof and not covered by it. In other words, that under the charge as made and under the evidence as received the judge has sentenced him, not under an illegal ordinance, but without the authority really of any ordinance of the city at all, and therefore without warrant of law. If this be true, defendant was not without remedy, but the remedy was not by appeal in the respects we have just been alluding to, as has been attempted here. There being no question before us within our appellate jurisdiction, the appeal is dismissed.

Succession of Von Hoven.

No. 11,428.

SUCCESSION OF JACOB VON HOVEN.

Where a person in his will bequeaths to his wife certain property, and appoints her as his executrix without selsin, it is her duty, in filing her final account, to account for all property left by the testator at his death, including that specially bequeathed to her, and to pray that she be authorized to dispose of the same in such manner and to such persons as she believes should be made under the terms of the will and the law. The heirs must be cited and made parties to this account and demand, and they have the legal right to make available all objections which they have to the same by oppositions thereto. Objections to the special legacy to the wife as being in excess of what could be bequeathed to her by her husband, can be urged in that way, as can also all objections to the items of the inventory, as being either appraised too high or too low. C. P. 1004.

46	911
47	818
46	911
48	931
49	1739
46	911
50	607
46	911
117	379

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

B. R. Forman Attorney for Executrix *et als.*, Plaintiffs:

An heir can not require that property given as a particular legacy be applied to pay debts, when there is more than enough of other property.

When a widow in community and executrix and an heir file a schedule of debts, and show there are debts to be paid and, excluding the legacy, no money to pay them, and demand an order of sale of enough property to pay the debts, and at the same time demand that the residue of the property be sold to effect a partition, and the only other heir admits that the property can not be divided in kind, and prays for a partition by licitation, a judgment ordering a sale of all the property not included in the particular legacy and reserving all other issues is an interlocutory order from which no injury follows, and, being in accord with appellant's prayer, she can not appeal. At all events on the pleadings and admissions the judgment should be affirmed.

When there is no prayer to reduce a donation to the disposable portion, and no such issue is made, a defendant in a petition to sell property to pay debts and to effect a partition has no right to demand that her right to bring action to reduce the donation be reserved to her.

Succession of Von Hoven.

When a case has been tried on evidence freely admitted and decided, the reservation of rights of action set up, but not formally decided, would be a matter in the sound discretion of the trial judge, and his failure to make a reservation not asked is no error in law.

It would be error in such a case for a judge by such a reservation to make a suggestion of an action in disregard of filial duty, which had never been brought.

Henry P. Dart Attorney for Heir, Appellant:

Where an issue is distinctly raised, looking to the reduction of a will as in excess of the disposable portion, it is an error for the court to reserve said objection to be urged against the executor's account. Such a claim must be made by direct action. 10 An. 28; C. C. 1504 *et seq.*

The opinion of the court was delivered by

NICHOLLS, C. J. Jacob Von Hoven died on the 9th of February, 1893. He left surviving him two daughters, issue of his first marriage, and a widow. He left a will dated October 31, 1890, by which he bequeathed to his widow certain real and personal property, and appointed her executrix without bond but without seisin. She accepted the executorship, and with the consent of Magadelina Von Hoven (wife of Edward Englebrecht), one of the heirs, she administered the succession, the property of which was inventoried under an order of court, on the 13th of February, 1893.

On the 16th of March, 1893, the widow as testamentary executrix and widow in community, joined by Mrs. Englebrecht, presented a petition to the court, in which they declared that they annexed thereto a detailed statement of the estimated debts and liabilities of the succession, and alleged that the bricks left and the outstanding accounts would not realize enough to pay the debts; that it was necessary to sell property to pay debts, because the movables and money left by the deceased were given as a particular legacy to the widow, and that certain landed properties (describing them) were acquired during the last community, and one-half belonged to the widow,

Succession of Von Hoven.

as a widow in community, which community she accepted under benefit of inventory. That both petitioners were unwilling to hold the same in common with Louisa Von Hoven (wife of Casimir Muller), the other heir of Jacob Von Hoven, and that it was necessary to sell the property in order to settle the community, and that it could not be divided in kind without greatly depreciating its value, and that it was necessary to sell certain specified real estate belonging to the separate estate of the deceased to pay debts, petitioner, Marie Englebrecht, averring that she was unwilling to hold said property in common, and that this can not be divided in kind without a depreciation of value, and that she could not come to any agreement with reference to a partition with her sister, Louisa Von Hoven. In view of the premises, petitioners prayed that Louisa Von Hoven be cited and that enough of the property described be ordered to be sold to pay debts; that experts be appointed to report whether or not the residue of the property not ordered to be sold to pay debts, and not included in the particular legacy to the widow, can be conveniently divided in kind without a depreciation of its value, and if they so report or the same be admitted by the defendant, Louisa Muller, that a decree for a sale be made, and in any event that a decree or partition be made of all the property of the succession not sold to pay debts, and not included in the particular legacy to the widow. That enough of the proceeds be left in the hands of the executrix to pay the debts and liabilities, and the residue be partitioned between the parties in interest according to their respective rights, and that they be referred to a notary to effect said partition.

Mrs. Louisa Von Hoven, joined by her husband, Casimir Muller, filed an answer to this petition in which, after pleading the general issue, they averred that Jacob Von Hoven was thrice married; that his first wife was the mother of respondent and of Mrs. Englebrecht; that she died in 1866, and the property, which belonged to the community between herself and Von Hoven is in the main the property now forming the estate of Jacob Von Hoven, in which property respondent Louisa Von Hoven, claims an interest as heir of her mother. That recently respondent's father admitted judicially in proceedings had in the courts of Louisiana that he had omitted from the inventory and had not accounted to his children, or included in the succession of their mother, some fifty thousand dollars belonging to said succession. That while it is true said Von Hoven caused

Succession of Von Hoven.

the succession of his first wife to be opened in and during the minority of the respondent, and caused the real estate to be adjudicated to himself, it is still true that he failed to account therein for the sum of fifty thousand dollars, and respondent was not aware that said money was and formed part of said community, until the facts were acknowledged by her father in the proceedings had in the matter of Weller vs. Von Hoven, No. 18,116 of the docket of this court 42 An. 602, and under the circumstances, and as heir of her deceased mother she is entitled to recover from the estate of her deceased father her virile share thereof, namely, one-sixth (her mother having left three children issue of said marriage), that is to say, eight thousand three hundred and thirty-three dollars and thirty-three cents, with legal interest from demand.

That about the year 1868 respondent's father contracted a second marriage with Barbara Weller, from whom he was judicially separated in 1884, and no children were born of that marriage, and that community was closed by the judgment rendered by the Supreme Court of Louisiana in the case between them reported in 42 An. 602. That respondent is informed that thereafter Von Hoven contracted a third marriage with one of the plaintiffs herein, and there were no children issue of said marriage. That under and according to the terms of the last will of said decedent, he attempted to give to plaintiff, his third wife, about one-half of his estate, which legacy is in excess of the share or portion reserved by law to respondent and her co-heir, and is in contravention of the law of this State, and especially in violation of the act of 1882 amendatory of Art. 1752 of the Civil Code, and said legacy should be reduced to the one-third of his estate, after paying the debts and charges of the same, including the amount due to respondent, as aforesaid. That the community between plaintiff and Von Hoven, if one existed (which is denied), did not acquire the real property referred to in the petition—on the contrary, the same was and is the separate estate of the decedent, bought and paid for with the separate funds of Von Hoven, and the acquisition or transfer of title when made to him, was paid for merely by credit on the judgment which plaintiff Von Hoven, in the suit of Von Hoven vs. Elizabeth Barlow, obtained in the said proceedings, the judgment being a mere recognition of the debt due by said Barlow to Von Hoven before his marriage with the plaintiff; but should it be decreed that said realty was and is an ac-

Succession of Von Hoven.

acquisition by and for the second community, then the said property and second community should be charged with the amount of said debt, interest and costs, to-wit, the sum of twenty-two thousand dollars, or thereabout.

That the list of debts furnished by the plaintiff is not a true showing; on the contrary, the said amounts are not due by the estate, and if due in any sum whatever, they are grossly overcharged and should not be recognized or admitted by the court. That the plaintiff has taken possession of the decedent's estate and sold the property thereof without the authority of the court, and without right so to do, whereby she has made herself liable for the debts of said estate, if any, and respondent avers that she has not filed any showing or account of the sums of money of which she has possessed herself in this and other ways—the same being the funds and property of the estate, and respondent asks that the plaintiff be ordered to render a just and true account of what she has done in the premises, and that she be condemned to restore to the estate the sums of money thus by her obtained.

That in the inventory taken in her absence by the plaintiff the property of the estate which she claims has been donated to her, and which she claims and reserves as her particular legacy, has been grossly undervalued, as respondent will prove on the trial; that live stock and vehicles, sand, and utensils of various kinds have been particularly undervalued, and the real value of the things contained in said special legacy exceeds by at least ten thousand dollars the valuation affixed thereon in said inventory. That in the said inventory is entered and valued at ten thousand dollars, five certain claims in suits by Von Hoven against the Texas & Pacific Railway Company, which claims have no value at all, and certainly no such value as has been given therein. That other claims mentioned therein have likewise been therein overvalued, the whole for the specific purpose of inflating the apparent share coming to respondent as heir at law of her father, and the said inventory is therefore not a just or true inventory of the estate.

That the decedent left upward of nine thousand dollars in bank, which can and should be used in paying debts, and it is not necessary to burden his estate with an administration for the purpose of paying said debts, if any—that being a matter which can be adjusted in the partition herein sought.

Succession of Von Hoven.

Respondent declares that she is willing to partition and divide said estate, and she admits that the property composing the same cannot conveniently be divided in kind, wherefore she prays that there may be judgment decreeing a full, final and definitive partition of the estate of Jacob Von Hoven by licitation, in the manner provided by law, on such terms and conditions as will subserve the best interests of all parties in interest. That the claims and pretences of the widow Anne M. Von Hoven to a community interest in the property referred to in her petition be denied, or if said property shall be held community, then that it and said community be condemned to pay and be subjected to the payment and return of the amount expended therefor and thereon by Jacob Von Hoven out of his separate estate, namely, the sum of twenty-two thousand dollars, with interest from judicial demand. That there be judgment in respondent's favor, against the plaintiff, recognizing respondent to be a creditor of said estate in the sum eight thousand three hundred and thirty-three dollars and thirty-three cents, with legal interest from judicial demand, and that same be paid out of the proceeds herein to be realized and in the manner pointed out by law. That the alleged debts claimed by plaintiff to be due by the estate be rejected, or if allowed in any amount, that they be reduced to fair and reasonable figures. That the widow aforesaid be condemned to file a just and true account of the moneys obtained by her from every source from the sales of the property of this succession. That she be condemned to pay and return the full value to the estate of property wrongfully sold by her as aforesaid. That the valuation of the items composing the special legacy to her be inquired into, and that said valuation as fixed in the inventory be increased by the sum of fifteen thousand dollars.

That she be prohibited from disposing of any of the remainder of said property except as the same may be ordered in this proceeding. That she be held liable as a widow intermeddling in the estate. That the overcharged and overvalued items in said inventory be stricken out and reduced to a fair and just estimate, and finally that the court refer all parties to a notary to adjust and partition the estate on the basis to be fixed by the Court's judgment and for all and general relief.

Subsequently to the filing of the above answer, Mrs. Marie Von Hoven as testamentary executrix and widow in community (under

Succession of Von Hoven.

benefit of inventory) and Mrs. Englebrecht, filed what they designate as "exceptions" to the demands of Mrs. Louisa Muller, set up in her answer—to so much thereof as she claims to be a creditor in the sum of eight thousand three hundred and thirty three dollars and thirty-three cents.

1. Because she has not presented her claim to the executrix and had it approved, and she can not set it up in this collateral manner, but only by a direct action.

2. The rights and interests of the said Louisa Muller in and to the succession of her mother, Margaret Grosz, have been fixed by a final judgment of the Parish Court of Jefferson Parish, liquidating her interest in the said succession eleven years old, that said judgment is *res judicata*, and can only be annulled for fraud in a direct action, and her action is prescribed by one, four and ten years, which prescriptions are specially pleaded. To so much of the demands of Louisa Muller as seeks to reduce the particular legacy, that it is premature and can not now be presented in this form and that the demand for an account is premature. No action was sought or obtained on these exceptions. The parties went to trial, evidence was adduced and the case was submitted. The District Court finally rendered a judgment ordering "that a partition be granted herein and to that end all the real property described in the inventory be sold at public auction with the exception of that which has been bequeathed to the widow, said sale to be made by W. A. Kernagan, auctioneer, who shall sign an act of sale upon the terms of one-third or more cash at purchaser's option, and the remainder on credit at one and two years with eight per cent. interest and the usual security clauses; that the funds arising from said sale be deposited in the judicial depositary and the executrix do immediately thereafter file her account; that the issues not herein disposed of raised by plaintiff and defendant be postponed and reserved, to be tried and decided upon by way of opposition to the account aforesaid." Mrs. Louisa Muller has appealed suspensively from that judgment. .

It was admitted in the lower court that the executrix is still in possession of all the property described in the inventory, except that which she has sold under the orders of the Court and that she has never filed any account.

Appellant's counsel in his brief says: "The only complaint we

Succession of Von Hoven.

make against the judgment which we have appealed from in this case is briefly that it has not decided the questions raised in the pleadings and does not protect the appellant and preserve her clear rights under the law.

"Appellant set up claims against her for their succession and averred that the legacy to the widow was in excess of the disposable portion. She charged that the inventory was inflated so as to reduce the apparent value of the legacy to the widow and increase the apparent value of the residuum, inasmuch as it appraised at its face value five certain lawsuits for damages brought by the decedent against the Texas & Pacific Railway Company, claiming ten thousand dollars damage for their illegal action in laying its rails and roadway on the public streets upon which decedent's property abutted. For the purpose of this discussion the other issues raised in the pleadings are pretermitted, as the right to discuss them is reserved in the judgment after the partition is obtained. On the question of reservation of the right to attack the legacy as being in excess of the legitimate we submit that the judgment will not be any protection to the heir, inasmuch as a suit to reduce the will can not be set up by opposition to the account. * * * The Code seems to require a direct action to reduce a donation (C. C. 1504 *et seq.*). If the judgment appealed from had dismissed as a case of non-suit, the action to reduce the will the exigencies of the situation would have been satisfied, but reserving as the judge does the rights of the pleaders to urge these things by way of opposition to the account, it seems to us no protection should an objection be raised by the legatee, or should she insist that the legacy forms no part of the succession to be accounted for on her account. This is the solitary question presented, and we respectfully submit that the judgment should be reversed and one rendered reserving the heir's rights to establish by direct action the excessive donation."

Mrs. Von Hoven, the testamentary executrix and widow in community (the legatee mentioned in the pleadings), and Mrs. Englebrecht have both acquiesced in the judgment.

The initial step in the immediate proceeding before us was a petition by the widow of Jacob Von Hoven, who was not only the widow in community with the deceased, but a legatee under his will and his testamentary executrix, in which she was joined by one of the two heirs of Von Hoven, asking for a sale of so much of the property

Succession of Von Hoven.

as was necessary to pay debts, a sale of all the residue (not including certain property bequeathed by the deceased to his wife) to effect a partition and a full and definitive partition between the plaintiffs and Mrs. Muller, the sole remaining heir. This heir, on being made a party, consented to a partition, in fact prayed herself that one should be made. The effect of the proceeding was to group together all parties interested in this succession, the executrix to a certain extent being charged with the settlement and liquidation of the estate. The effect of the judge's order or judgment will be to bring about a sale of all the property of the succession (save that specially bequeathed to the widow), for the double purpose of paying debts and of leading up to the ascertainment, settlement and liquidation of the rights of all concerned. The value of properties will be ascertained by public bids and not by conjectural estimates. The funds realized will be placed securely in bank, and there remain, to be made primarily available to the extent shown to be necessary for the payment of debts, and finally for purposes of distribution. The account ordered to be filed will afford a direct and proper method of fixing the exact liability of the estate, and enable Mrs. Muller to contest contradictorily with those whom the testamentary executrix recognizes as creditors, the correctness of that recognition. The reality and amount of their claims could not be passed upon in their absence, and definite knowledge as to their reality and their amount is an important factor in this litigation. The proceedings reach us freed from all trouble as to questions of form, the only exception taken in the lower court having been abandoned, the parties having presented squarely, by their respective pleadings, their various contentions, and having gone to trial upon them. Possibly the case was in a situation to have had determined by the Court more of the issues raised than it thought proper to decide, but we do not think that any of the parties have been or will be aggrieved or injured by this course; on the contrary, when the judge will be called on hereafter to pass upon the issues he will deal with certain matters as fixed facts which now would be more or less matters of conjecture—approximations at best.

We do not understand that the law forcedly requires the District Judge to dispose, prior to a sale of the property by licitation, or prior to the rendition of the account by the executor (when the succession is under administration with such a representative), of all the issues

Succession of Von Hoven.

which the parties to a partition may raise. The particular course to be pursued will be dependent upon the facts of different cases as they present themselves. What might be proper in one would not be at all proper or advisable in another. In the case at bar, as matters now stand, not only are all the parties in interest before the court on issues raised by each without objection, but all the property left by the deceased is for the purposes of this litigation, still in the hands of the executrix. The record shows no transfer of property to third persons nor the existence of any adverse rights which would be injuriously affected by the form in which matters have shaped themselves. Appellant seems to be apprehensive that the legatee, Mrs. Von Hoven, could successfully object to the trial of an issue contradictorily with her as to the reduction of her legacy when presented in the form of an opposition to her account as executrix. Even could a legatee make such an objection under circumstances different from the present, the widow, as executrix and legatee, certainly could not object, by reason of the form of the proceeding in the present case, for she has acquiesced in the judgment of the court "postponing" the determination of the issues not passed on, and directing that they be "tried" and decided upon by way of opposition to the account.

We do not understand the judgment of the lower court to have thrown any of the parties out of court. Matters are to stand as they now are, both as to parties and to pleadings, until the executrix files her account, when all issues which have been raised and have not as yet been passed upon are to be renewed. The only issues disposed of up to the present time are as to the sale of the property of the succession other than that bequeathed to the widow—the right of partition and the necessity and duty of the executrix to account. The judgment contemplates first a sale of the property, and next an account by the executrix, to which the pleadings already filed by Mrs. Muller are to be taken as an anticipated opposition. When the executrix files her account she will have to charge herself with the funds not only arising from the sales now ordered, but those already made of movables under order of court. In addition to this it will be her duty to refer to all property which is placed upon the inventory, and show what has become of it; to state what disposition should be made of that remaining under her understanding of the rights of parties, and to pray that this disposition

Succession of Von Hoven.

be authorized and ordered. She will have to file a list of the debts and liabilities of the succession, which she recognizes, and have the usual advertisements made under order of Court, calling on all parties in interest to show cause why the account should not be approved and homologated, and the funds and property disposed of as prayed for in the account and petition of the executrix. The account which the executrix will have to file is not simply an account for the payment of creditors, but an account for a settlement of the succession finally and contradictorily with the heirs. They will have to be specially made parties and regularly cited in the premises. In the case at bar, the property bequeathed to the widow will have to be referred to in the account and petition of the executrix, and she will have to pray contradictorily with the heirs that it be recognized as hers under the legacy and delivered to her. She will not be at liberty to take possession of that property without orders of Court, or omit it from the account. When cited, Mrs. Muller will unquestionably have the right to "*oppose*" the proposed delivery of the property to the widow and the right to attack the legacy. Art. 1004 of the Code of Practice is express to that effect. It declares, "If the curator or executor obeys the order and renders his account the heirs or other claimants shall within three days afterward file their written objections, if they have any, signed by themselves or their counsel, to each item of the account to which they object or of which they pray for the rejection."

In this case Mrs. Muller, on being cited, will be entitled to raise all objections which she may have to anything which has been done by the executrix, or to anything which she proposes should be done through order of Court. Succession of Bright, 38 An. 141; Morris vs. Cain, 35 An. 759; Herber vs. Thompson, 46 An. 186. She will be at liberty either to stand on her pleadings as already filed by mere reference thereto and annexing them to her opposition, or she may do this and enlarge the present pleadings and prayers, if she chooses so to do. As we have said, the account which will hereafter be filed by the executrix will have a broader scope than the ordinary administrator's account, involving a mere payment of certain funds to specified creditors. Succession of Conrad, 45 An. 94. We think the apprehensions of injury which Mrs. Muller refers to in her brief are totally unfounded. Her right to claim in this case—the reduction of the legacy to the widow on the grounds stated by way

State vs. Williams.

of opposition, is undoubted. It is very questionable whether she has as yet fairly raised an issue on that question, for while matters incidentally connected with and which may have a bearing on that issue are referred to and relief asked in respect to them, the plaintiff's statement that no "*prayer*" has as yet been made for the reduction of the donation is true.

We see no basis for the present appeal.

Judgment affirmed.

46 922
46 1407
46 1418
46 1419
46 922
46 106

No. 11,488.

STATE OF LOUISIANA VS. J. HERBERT WILLIAMS.

In an open policy of insurance, in which an aggregate amount is expressed, there are as many contracts of insurance as there are endorsements on the policy of separate shipments of goods.

If the open policy contains all the conditions which govern the shipment of goods, specially insured under the policy, and the company reserves the right to reject or accept each special insurance in each shipment, the contract must be considered as made at the domicile of the company issuing the open policy.

Under such a policy the insurance company, having no agent in Louisiana, it can not be considered as doing an insurance business in the State.

There is a clear distinction between the business of an insurance agency, and the conducting of an insurance business.

A person who takes out policies in a foreign company having no agent here, and which does no business here, can not be made to pay a license which the company would pay if doing business.

It is within the power of the Legislature to define what acts of a person, in issuing and procuring the issuance of insurance policies, may constitute him an insurance agent. But after defining his occupation it is not within its power to make him pay a license for a foreign corporation whose business he undertakes.

The Legislature can not appoint by statute an agent for a foreign insurance company, for any purpose as its legally constituted agent, as it is in violation of Art. 236 of the Constitution.

The right to prohibit foreign corporations from doing business in the State, without complying with Art. 236 of the Constitution carries with it the right to enforce the prohibition by appropriate legislation.

APPPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

E. H. McCaleb, Jr., Attorney for Tax Collector, Plaintiff and Appellant:

An "open policy" of marine insurance entered into between defendants and certain foreign insurance companies in New York (not located in this State, as required by Act No. 76 of 1886) contains the following provision:

"No risk is to be insured by this policy until a letter is signed by A. B. and addressed to the president of the company, detailing the name of vessel, particulars of shipment, with description of the property and amount to be insured, is deposited in the postoffice at New Orleans, which must be done while the property is in good safety, and, in all cases, prior to the departure of the risk from New Orleans, a duplicate of such letter to be sent by the following mail."

There is no risk covered by said open policy until such letter or application is deposited in the postoffice at New Orleans.

Upon the mailing of said letter or application, insurance is effected at the port of New Orleans upon the particular shipment detailed in the letter, and such risk is located in this State. These acts constitute "a carrying on" of an insurance business within Louisiana from which premiums are derived. Art. 1797 *et seq.*, C. C.; Am. and Eng. Ency. of Law, Vol. 3, p. 857.

A State may exclude foreign corporations, and the power of exclusion or prohibition is coextensive with the power of regulation by taxation. And it is very common to subject foreign insurance to special police regulations. *Liverpool Insurance Company vs. Mass.*, 1 Wall. 506; *Bank of Augusta vs. Earle*, 18 Pet. 519; *Doyle vs. Insurance Company*, 94 U. S. 535; *Pierce vs. People*, 106 Ill. 11; *Tiedeman on Police Power*, p. 592, and authorities there cited.

These contracts are performed, consummated and executed in Louisiana, and the business conducted here by a foreign corporation (which has not complied with the State laws), through the assistance, instrumentality and agency of a person residing in Louisiana.

Under a revenue law it is competent for the Legislature to define or determine the status and liability to license taxation of any person or firm who assists and conducts the business in Louisiana of a foreign insurance company (not located here as required by the Constitution and law). And there is no paramount authority upon definitions in legal matters, save that power which can make both the law and the definition. *Pierce vs. People*, 106 Ill. 11; *Moses vs. State*, 65 Miss. 60; 3 So. Rep. 140.

It is well settled that revenue laws are to be liberally construed
"And they are remedial in character as intended to pre-

State vs. Williams.

vent fraud, suppress public wrong and to promote public good. They should be so construed as to carry out the intention of the Legislature in passing them, and more effectually accomplish these objects." United States vs. Hodson, 10 Wall. 395; Taylor vs. United States, 3 How. 210; Cliquot's Champagne, 3 Wall. 145; Wood vs. United States, 16 Pet. 197; United States vs. Breed, 1 Sumn. 159; Cornwall vs. Todd, 38 Conn. 443; Davy vs. Morgan, 56 Barb. 218.

This proceeding is due process of law. Hagar vs. Reclamation District, 111 U. S. 701; Kelly vs. Pittsburg, 104 U. S. 87; McMillan vs. Anderson, 95 U. S. 37; Davidson vs. New Orleans, 96 U. S. 97; Cincinnati vs. Kentucky, 115 U. S. 321.

It is not an attempt to regulate commerce between the States. Crutcher vs. Kentucky, 141 U. S. 59; Paul vs. Virginia, 8 Wall. 168; Fire Association vs. New York, 119 U. S. 110; Doyle vs. Insurance Company, 94 U. S. 535; also citing Mining Company vs. Pennsylvania, 125 U. S. 181.

Branch K. Miller Attorney for Defendant and Appellee:

Where a buyer ships cotton from New Orleans to a foreign port, and obtains thereon an open policy of insurance from an underwriter located in another State, the obtaining of such policy being necessary to the carrying on of said business, the latter is an instrument by which foreign commerce is carried on, and the State has no power to tax the business of the underwriter conducted in this manner. 96 U. S. 1, 9; 105 U. S. 489; 121 U. S. 450; 122 U. S. 346; 127 U. S. 640.

Where an insurance company issues an open policy in New York, where the premiums are paid, and where a loss, if any, is payable, such contract is made and performed out of the State of Louisiana and beyond the reach of its taxing power. The fact that the assured in New Orleans is required to mail therefrom a letter of advice reporting each shipment to be covered by the policy does not have the effect of bringing the contract within the jurisdiction of this State. 31 An. 781; 33 An. 10; 43 An. 113; 27 N. E. Rep. 849.

Section 7 of Act 150 of 1890, so far as it undertakes to make the assured the agent of his underwriter domiciled in another State, and to make the former personally liable for any license

tax claimed to be due by the latter, no such requirement being made as to underwriters domiciled in this State, or elsewhere, when represented by agents in this State, deprives the assured of his property without due process of law, and denies him the equal protection of the laws and is unconstitutional, null and void, both under the Federal and State Constitutions. 6 Neb. 54; 15 Mass. 447.

Thomas J. Semmes for same:

No one denies the power of the State to exclude foreign corporations from doing business within its limits, if such corporations are not employed by the Federal Government, or are not engaged in interstate or foreign commerce. No one denies the power of the State to exact from foreign corporations compliance with such conditions as it pleases, for allowing them to do business in the State. The State may punish by penal enactments those who act in any manner as the agents of an unlicensed foreign corporation. 3 So. Rep. 140; 13 Grattan, 767; 118 Pa. 322; 166 Ill. 11.

The power to punish is one thing, the power to tax is another.

A tax is a rate or sum of money assessed on the person or property of a citizen by government for its use. Cooley, Cons. Lim. 587; Topeka case, 20 Wall. 664. The power to tax is the power to impose on the person taxed a personal obligation. 42 An. 1135; 44 An. 279.

There is no power in the Legislature to make liable for the license tax, any other person than the person who pursues the occupation. Const., Art. 206. The Legislature may pass penal laws and subject to prosecution and punishment, those who aid others in violating the law, but it can not make one person responsible for the taxes of another person. This the act of 1890 proposes to do. This is, indeed, inflicting punishment by legislative act, and in that sense, such an act will amount to a bill of pains and penalties, which is nothing more nor less than a bill of attainder. *Ex parte Milligan*, 4 Wall. 323; also citing 51 Pa. St. 16, *Tyson vs. School Directors*; *Town vs. Flatbush*, 60 N. Y. 406. Opinion Justice Field in *Santa Clara Co vs. Pacific R. R.*, 18 Fed. Rep. 392.

This Act of 1890 fastens on the citizen a character which he never assumed, and imposes on him a liability for a tax levied on his supposed principal.

State vs. Williams.

What makes the matter worse, the acts for which the tax is levied, are illegal, and the illegality can not be removed by legislation, because it is the Constitution which exacts of every foreign corporation, as a condition on which it is allowed to do business in the State, that it shall have a place of business here as well as an authorized agent, upon whom process may be served.

The Legislature can not absolve a foreign corporation from these conditions, or substitute any other kind of agent in lieu of the agent prescribed by the Constitution.

The Constitution of Georgia granted certain exemptions to "the head of a family."

The Legislature of that State passed a law declaring that a single person, who at the time of the adoption of the Constitution, or before, lived habitually as a housekeeper to himself, was "the head of a family," and as such entitled to the constitutional exemptions.

The Supreme Court of Georgia held the law to be invalid, because the words "head of a family," as used in the Constitution, did not mean a single man who lived by himself, although he kept an establishment with servants, etc. *Calhoun vs. McLendon*, 42 Ga. 406.

The Constitution defines a license tax to be a tax on persons pursuing the several trades, professions, vocations or callings, and it is only persons who pursue such vocations or callings, who can be rendered liable to such a tax. This is almost the language of the Constitution, Art. 206.

The Legislature can not then impose a license tax on an agent, who transacts the business of his principal. The man to whom the business belongs is the man from whom the license tax is to be collected, whether the business is done by himself personally or by others for him. In an "agency business," the person who conducts it does so for himself and in his own interest. 31 An. 784; 33 An. 18; 40 An. 175; 43 An. 133.

The opinion of the court was delivered by

MCENERY, J. The defendant is a cotton buyer engaged in purchasing cotton and shipping it from the port of New Orleans.

The cotton so purchased, is insured in an open policy in the Atlantic

State vs. Williams.

Mutual Insurance Company, a foreign corporation having no agent, in the State of Louisiana, appointed as the law requires.

The State Tax Collector proceeded, by rule, against the defendant to compel him to pay, personally, the license which it is alleged is due by said insurance company under the provisions of Sec. 7 of Act 150 of 1890.

This section graduates licenses on each and every insurance company, association, corporation, or other organization or firm or individual doing and conducting an insurance business of any kind * * * whether such company * * * or other organization, firm or individual is located or domiciled here, or operating here through a branch department, resident board, local office, firm, company, or corporation or agency of any kind whatsoever, shall pay a separate and distinct license on said business for each company represented * * * on all risks located within the State, and upon risks located in other States or foreign countries upon which no license has been paid. In the *proviso* to the section, there is a prohibition to any foreign corporation doing business in this State, except through an agent duly authorized and accredited for the purposes of said business, and for all purposes connected with licenses and taxation and service of process.

The agent is to be appointed by authentic act, a copy of which is to be deposited with the Secretary of State. The *proviso* further states that any person or firm who shall fill up or sign a policy or certificate of insurance, on open marine or fire insurance policy for a corporation, association or persons not located or represented in this State shall be considered the agent of such corporation, firm, association or persons, and shall be liable for all taxes, licenses and penalties enforced by the provisions of this act upon such persons, corporation or association, as if represented by a legally appointed agent.

The open policy issued by the Atlantic Mutual Insurance Company is one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be endorsed from time to time in the policy.

There is no dispute as to the fact, that this open policy was consented to in New York, and the policy issued directly from the domicile of the company. It was issued to the defendant, J. Herbert Williams, on account of himself, and to cover cotton in bales pur-

State vs. Williams.

chased and shipped by him, on which drafts are drawn for the purchase, upon whom it may concern.

The amount of the open policy is two hundred thousand dollars, covering shipments of cotton from 23d September, 1893, to September 23, 1894, "to ports in Great Britain direct or via New York for transshipment, and to ports on the Continent between Hamburg and Trieste inclusive, direct or via New York for transshipment; including the risk of fire at New Orleans, while in preparation for, or in process of shipment or awaiting shipment, but no fire risk prior to shipment to be covered, unless the vessel is in port loading or ready to load, or until the cotton is discharged from the railroad cars and at the risk of J. Herbert Williams, premium to be paid by the assured at the rates of this company.

"No risk is to be insured by this policy until a letter signed by J. Herbert Williams and addressed to the president of this company, detailing name of vessel, particulars of shipment, with description of the property and amounts to be insured, is deposited in the postoffice at New Orleans, which must be done, while the property is in good safety, in all cases prior to the departure of the risk from New Orleans; a duplicate letter to be sent by the following mail.

A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to J. Herbert Williams. Risks endorsed hereon and subsequently taken off and new and separate policies issued, not to exhaust this policy.

"The said goods and merchandise hereby insured are valued, including premiums, at the sums expressed in the letter of advice as provided for herein, but not to exceed the invoice cost and ten per cent." The policy requires the notice, or application as it is called in the testimony, to be mailed *prior* to the shipment, and on its receipt the company has a right to accept or reject the application for insurance on the particular shipment. We presume the notice is required to inform the company whether or no the conditions prescribed by the policy, previously issued in New York, have been complied with. The policy required the premium on the insurance of any particular shipment of cotton, to be paid on the presentation of the invoice or bill of lading and notice of shipment. The defendant, in pursuance of the terms of the policy, makes an application through his broker in New York, to insure prior to the shipment of the cotton. His broker pays the insurance.

In the case of *Douville vs. Insurance Company*, 12 An. 259, this Court interpreted an open policy similar in all essentials to the one under consideration.

In that case the plaintiff had failed to furnish the defendant company with an invoice of goods, purchased in Paris, which were lost under an open policy.

This Court said, "On a policy of insurance in this form, there must necessarily exist as many contracts of insurance as there are, endorsements upon the policy of separate shipments of goods. The delivery of the policy four years previously did not constitute a contract of insurance upon goods which might be shipped by the Arctic. Something more was required, viz.: Consent on the part of the plaintiff, a production of her invoices and the payment of the premium on her behalf, and a communication of the unusual manner in which these goods were intended to be brought over, viz., in the trunks of a partner and an employé of the house, as baggage; and, on behalf of the company, an agreement to take the risk in this form." The principle announced here will govern this case. The company, by the terms of the policy, had the right to have notice of the mode of shipment, and it could accept the policy or reject it if the shipment was by unusual methods, and incurred extra and hazardous risks. The open policy in this case is even stronger in favor of the separate contracts of insurance being completed in the State of New York, by the acceptance of the company, or it would be more accurate to say that each shipment of cotton and the insurance thereon, is part and parcel of the original contract of insurance, as it must be referred to the open policy for construction and interpretation. In that policy is found all the conditions for each separate shipment and insurance of cotton covered by the open policy. In the separate contracts or shipments there is no agreement or condition that is not found in the open policy.

While the open policy is a separate insurance on each shipment of cotton, and the risk is to commence, as stated in the policy, from its loading on shipboard, or awaiting shipment, this is only one incident of the contract, material and important, but does not control the fact as to the place of making the contract. This is to be determined by the final assent to it, when it becomes complete and perfect.

To illustrate: Suppose a resident of New York City takes out a policy of insurance on property owned by him in New Orleans, and

State vs. Williams.

the agreement is that the risk is to commence instantly on the issuing of the policy. The entire contract having been made in New York, the assent having been given there and the contract completed, the *risk* is only an agreement or stipulation in the contract. So that the stipulation in the open policy, that the risk is to commence from a certain time in New Orleans, does not make the contract a Louisiana contract.

The original policy and the special insurances effected under it, are New York contracts, as the policies were issued from the domicile of the foreign corporation and assented to there. *Claffin vs. Meyer*, 41 An. 1048. We have decided that a foreign insurance company, which issues policies directly from its domicile, who has no agent here, and who only agrees to accept risks placed for them by a person residing here, can not be compelled to pay a license. *New Orleans vs. Rhenish Lloyds*, 31 An. 781.

The Atlantic Mutual Insurance Company, not having done any business in this State, the defendant can not, even under the provisions of Act 150 of 1890, Sec. 7, be considered as its agent.

That part of Sec. 7 of Act 150 of 1890, quoted above, constitutes the person making these special contracts of insurance, under an open policy, the agent of the company, as though he had been duly appointed by law. If such is the effect of the act, and the agent thus appointed becomes the agent of the company, upon what principle can he be made personally liable for the debt of the principal?

"A clear distinction exists in law as well as in fact, and must be observed by courts, between the business of an insurance agent and that of a person or firm or corporation, conducting or doing an insurance business." *State vs. Woods*, 40 An. 175; 31 An. 781; 33 An. 11.

If the defendant is liable at all, it is because of his agency for an insurance company domiciled out of the State.

We think it is within the power of the General Assembly to declare what acts of a party in issuing, or procuring the issuing of insurance policies may constitute him an insurance agent, and subject him to the license required of such agents. But after defining his occupation it is not within its power to make him personally liable for the license of a foreign corporation whose business he undertakes. The business of an insurance agent is a separate and individual industry or occupation and only taxable as such. 31 An. 781.

In the case of *State vs. Woods*, 40 An. 177, this Court said: "The

State vs. Williams.

attempt of the State, by means of this proceeding, is to make them personally liable for the license which is contemplated for the companies or corporations which they represent, and to subject their own property to the privilege, created in favor of the State, against the property of the parties who may owe the license provided by the statute.

“Such a proposition finds no sanction in reason or justice, and much less in the very law under which the proceeding has been instituted.”

In that case the proceedings were instituted against certain insurance agents to make them liable for licenses for conducting an insurance business. The licenses exacted were for the amount of business done by the corporations in this State which they represented.

The suit was instituted under the provisions of Act 101, Sec. 7, of 1886, which are identical with those of Act 150 of 1890, Sec. 7, except the proviso in the latter act. The present proceedings in effect are the same, as in that suit, to make the agent responsible as one who conducts an insurance business. No law can make a person answerable for a debt which he does not owe. The defendant does not do an insurance business, and he can not be made to pay a license for that occupation. The Constitution, Art. 236, requires the foreign corporation, which desires to do a business in this State, to appoint its own agent, therefore the Legislature can not appoint one for it.

It is safe to say that the Legislature can not appoint an agent for an insurance company to represent said company, for any particular purpose, as its legally appointed agent in violation of Art. 236 of the Constitution. We do not mean to be understood that the Legislature can not designate persons who transact the business of a corporation domiciled out of the State, and having no agent here as proper persons upon whom process may be served. Nor do we wish to be understood to announce, that the State is powerless to prevent the evil attempted to be suppressed by Sec. 7 of Act 150 of 1890.

The right to prohibit foreign corporations from doing business in the State, unless they comply with its regulations, can not be denied, and this right carries with it the power to enforce the prohibition by appropriate legislation. *Moses vs. State*, 3 So. Rep. 140.

State ex rel. Ziegler vs. Judge.

The State can, therefore, prohibit its own citizens from conducting the business of taking out an open policy covering special contracts of insurance in a foreign insurance company, which has not complied with constitutional and statutory regulations, as it has the exclusive right, by virtue of its sovereignty, to regulate the conditions, capacity and state of all persons within it; the validity of contracts and other acts done within its limits; the resulting rights and duties growing out of those contracts and acts, and the remedies and modes of enforcing justice, and subjection to its will. Story Conf. Laws, paragraph 18.

Judgment affirmed.

46 982
110 744

No. 11,552.

STATE EX REL. SAMUEL J. ZEIGLER VS. S. L. TAYLOR, JUDGE OF
THE FIRST JUDICIAL DISTRICT, PARISH OF CADDO.

A judgment which may be provisionally executed, notwithstanding an appeal has been taken therefrom, is not susceptible of a suspensive appeal. That proposition involves a contradiction in terms.

APPPLICATION for *Mandamus*.

Land & Land Attorneys for the Relator:

It is submitted that the question of a suspensive appeal from a judgment ordering a cession of property, etc., pursuant to Act 134 of 1888 is *res nova*.

The appointment of a provisional syndic is but an incident or sequence of the decree, and to say that because a suspensive appeal will not lie from such an appointment, *ergo*, such an appeal will not lie from the decree of cession, is a *non-sequitur*.

That a suspensive appeal does not lie from a decree for a forced cession is well settled. 34 An. 130; 36 An. 198.

Act 580, C. P., applies only to cases involving contests for administration, and not to cases where the question is as to necessity of any administration at all. 22 An. 23; 26 An. 122.

The appointment of a provisional syndic presupposes that the question of surrender, *vel non*, has been finally adjudicated. R.

S. 1792, 1788. The reversal of the decree of bankruptcy, on a devolutive appeal, would nullify all proceedings had and create confusion and uncertainty in the administration of the law.

Respondent Judge in propria persona.

The opinion of the court was delivered by

WATKINS, J. The object of this application is to coerce respondent to grant relator a suspensive appeal, grounded on the judgment and decree in the proceedings in the court of the respondent, which are thus described in the relator's petition, viz.:

That in certain proceedings, in respondent's court, in December, 1892, relator obtained judgment granting him a respite of one and two years.

That recently several persons, claiming to be creditors of his, obtained rules against him, under the provisions of Act 134 of 1888, in which they aver his failure to make payments to them in conformity to the terms of said respite, and pray that he show cause why the judgment decreeing such respite should not be vacated and annulled, and why he should not forthwith make a cession of his property to his creditors.

That in his answer to said rules he set up, *inter alios*, the unconstitutionality of the Act of 1888.

That on trial of said rules judgments were rendered making same absolute, and decreeing that the judgment granting the respite be vacated and annulled; that he forthwith make a cession of his property to his creditors, and that a provisional syndic be at once appointed, and the clerk of court be directed and required to convene a meeting of his creditors.

That immediately thereafter—on the following day—he applied to the respondent for an order of appeal, suspensive and devolutive, made returnable to this Court according to law, the amount in dispute as well as the fund to be distributed exceeding two thousand dollars.

That the respondent declined his application, making thereon the following endorsement, viz.:

State ex rel. Ziegler vs. Judge.

"I decline to grant a *suspensive* appeal from the judgment rendered in this case on the authority of the case of *State ex rel. Levy & Son vs. Ellis*, Judge, 40 An. 818, but am willing to grant a *devolutive* appeal."

The respondent's return is in substance, the same as the aforesaid endorsement.

An examination of our opinion in the *Levy* case discloses its complete analogy to the case under consideration in every essential particular, and a close observance of the terms and provisions of Act 184 of 1888.

The object of that statute was evidently to speed the liquidation and settlement of estates of insolvents, and if they are to be halted or impeded by *suspensive* appeals the remedy would be practically valueless.

The act provides that in case the respited debtor shall fail or neglect to make payment according to the terms of his respite, any creditor may proceed against him summarily by rule, to have his respite vacated and annulled, and to compel him to make a cession of his property to his creditors.

And it further provides that the Court in making such rule absolute shall appoint a provisional syndic and order a meeting of creditors.

That is precisely what the respondent has done, and the question is, whether or not the debtor is entitled to *suspensively* appeal from said judgment.

According to the opinion of this Court in *State ex rel. Levy vs. Ellis*, Judge, such a judgment belongs to the class of judgments which are provisionally executed, although an appeal has been taken. The Code of Practice distinctly provides that judgments relating to the appointment of syndics are of that class. C. P. 580; R. C. C. 8098; Act 184 of 1888.

It is evident that the decision of the Court in that case is correct, and for that reason the relief prayed for by the relator must be denied. *Vide State ex rel. Marx vs. Judge*, 45 An. 1349, giving a construction to Act 184 of 1888.

It is therefore ordered and decreed that the restraining order herein made *in limine*, be rescinded, and that the applications for writs of prohibition and *mandamus* be refused at relator's cost.

Rehearing refused.

State vs. Olympic Club.

No. 11,421.

STATE OF LOUISIANA VS OLYMPIC CLUB.

1. A criminal statute denouncing what is commonly called prize fighting to be a misdemeanor, punishable by fine and imprisonment, coupled with a *proviso* that the provisions of the act shall not apply to exhibitions and glove contests between human beings, which may take place within the rooms of regularly chartered athletic clubs, presents a question of fact to be determined by the Court or jury, as to whether any given contest or series of contests come within the designation of the statute as a prize fight or within the scope and meaning of the *proviso* as a glove contest.
2. As the State of Louisiana is in Court, seeking the forfeiture of the defendant's charter, on the ground that the corporation has committed acts *ultra vires* of its charter, and is met with the provisions of an act of her own Legislature which, in terms, authorizes just such contests as the witnesses describe the club contests to have been, this court will be excused for declining to disturb a finding of a jury in favor of the defendant on a question of facts.
3. Conceding such contests to be violative of good morals and of a sound public policy, the remedy comes plainly within the prerogative of the legislative department of the government, which alone can be looked to for relief.

46 935
 47 1096
 47 1099
 46 935
 52 980
 46 935
 115 780

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

M. J. Cunningham, Attorney General, for the State, Appellant.

E. Howard McCaleb and *B. R. Forman* of Counsel:

It is the duty of the Attorney General to institute proceedings against all corporations to obtain the forfeiture of their charter in case of the violation of the law. Revised Statutes, Sec. 181, Act 65 1884, p. 71; *State vs. Atchafalaya R. R. Co.*, 6 R. 68; *Riggin vs. Union Bank*, 18 An. 677; *Belden vs. Fagan*, 22 An. 545; *State vs. Citizens Bank*, 31 An. 836.

A corporation may be dissolved by the forfeiture of its charter, when it abuses its privileges, or refuses to accomplish the conditions on which such privileges were granted. Civil Code, Art. 447.

When there is proven a clear abuse of its privileges, (a) by gambling, by betting on a prize fight, (b) carrying on and conducting a prize fight, (c) paying men large sums of money to commit assault and battery on each other, (d) and do each other great bodily harm, (e) commit an affray, (f) keep a grogshop without a license, and doing such things not contemplated by Act 112, 1882, or by the charter, then the charter should be forfeited. *Morawetz on Corporations*, Secs. 649 to 654; *Beach on Corpora-*

State vs. Olympic Club.

tions, Secs. 54, 58; *Belden vs. Fagan*, 22 An. 545; Constitution of La., Arts. 235, 237; Am. R. R. and Corporation Reports, Vol. 1, pp. 604, 562; *People vs. North River Sugar Refining Co.*, *Id.*, p. 587; *Terrett vs. Taylor*, 9 Cranch, 51; Am. and Eng. Ency. of Law, Vol. 4, pp. 302, 306, No. 8; American Digest 1892, p. 1045, Nos. 606, 607, 608.

No corporation can engage in any business other than that authorized by its charter (Const., Art. 237). The clubs authorized by Act 112 of 1882, including athletic clubs, are non-trading corporations and have no right to engage in any business for profit.

The *proviso* of Act 25 of 1890, the prize fighting law, does not make prize fighting lawful in athletic clubs when they are declared unlawful elsewhere. This would be a forced construction and would read into the law an intention not therein expressed. *State vs. King*, 12 An. 593.

Aiding and abetting prize fights constitute misfeasance. *Regina vs. Brown, C. and M.* 314 (Alderson); *Regina vs. Orton*, 14 Cox' Criminal Cases; *Regina vs. Perkins*, 4 C. and P. 587, Patterson; *Regina vs. Young*, 10 Cox C. C., Bramwell; *Regina vs. Billingham*, 2 C. and P. 234, Bramwell; *Regina vs. Orator*, L. T. N. S. 292, C. C. R.; *Regina vs. Cuney*, 8 L. R. Q. B. Div. 534; *Sullivan vs. State*, 67 Miss. 352; *Commonwealth vs. Barrett*, 108 Mass. 302; *Commonwealth vs. Welsh*, 7 Gray, 324; *Beulter vs. Clark*, Ball *nisi prius* 16; *Bell vs. Hansley*, 3 Jam. N. C. 131; *State vs. Wren*, 1 Hanks, N. C. 420; *Adams vs. Waggoner*, 33 Ind. 534; *State vs. State Bank*, 1 Blackford Ind. 534; *People vs. Dispensary Society*, 7 Lans. N. Y. 304; Morawetz on Corporations, 1024; *Danville vs. State*, 16 Ind. 456.

What constitutes prize fights is a question of law to be determined by the Court, from the facts proved to have taken place, and not from the opinion of witnesses. *Seville vs. State*, 30 N. E. 621.

People vs. Taylor, 56 N. W. 27, and it is a term in common use and so simple as to need no definition. Dictionaries of Worcester, Webster, Stormonth, Century Co. Cases cited above, and the following: *Commonwealth vs. Welsh*, 7 Gray, 324; *Commonwealth vs. Burnett*, 108 Mass. 303; *People vs. Kent*, 1 Douglas (Michigan), 42; *Rice vs. People*, 15 Mich. 9; *Durand vs. People*,

State vs. Olympic Club.

47 Mich. 332; Lohman vs. State, 81 Ind. 15, 177; State vs. Smith, 30 An. 846; Sedgwick on Statutes, 279, 287, 335.

In construing the meaning of a law, while the expression of the Legislature, not the moral effect, should govern the decision; neither should the decorum preserved in the surroundings and management of the prohibited act, or the respectability of some of the audience have any influence upon the determination of the question whether the act is prohibited or not. The Court should not look to the comparative brutality of the exhibitions, whether more or less brutal than foot ball or other permitted exhibitions—it looks to whether the acts must be classified under the received definition of a term, the act designated by said term being prohibited by law.

Whether prize fights or not, the seventeen pugilistic fights for large rewards, carried on and conducted by the club, were assaults and batteries and affrays, and preceded by illegal aleatory contracts, in violation of the public policy of the State, declared in the Constitution, Arts. 172, 234, 235, and Revised Statutes, Secs. 796, 699. ✓

Because the contestants wore light gloves it matters not. The contests were fought "to a finish," for a prize, before a large crowd, and were not exhibitions of scientific boxing or sparring for points. Seville vs. State, 30 N. E. Rep. 621; People vs. Taylor, 56 N. W. Rep. 27; Reg. vs. Orton, 14 Cox C. C. ✓

Consent of all the persons engaged does not make it any the less an offence against the State. Cases above cited, and particularly: Greenleaf on Evidence, Vol. II, Sec. 85; Eng. and Am. Ency. of Law, Vol. I, pp. 785, 807, Sec. 22; Regina vs. Cuney, 8 Q. B. Div. 534; Bishop on Criminal Law, Sec. 35; 119 Mass. 350; Logan vs. Austin, 1 Stewart (Ala.), 576. ✓

The proviso of Act 25 of 1890 should be strictly construed so as to conform with the legislative intent. It does not destroy the enacting and antecedent clauses, nor is it a grant to perform a prohibited act. State vs. Fernandez, 39 An. 539; Constitution, Arts. 46, 235; United States vs. Dickson, 15 Pet. 141; Epps vs. Epps, 17 Ill. App. 196.

A law should be so construed as to give effect to each of its parts; and the minor provisions, with reference to the main intent and object, and not so as to defeat it.

State vs. Olympic Club.

And where a license issued, it has been held, that the State can not be estopped in demanding the dissolution of the corporation for misuser and non-user. See *People vs. Phoenix Bank*, 24 Wend. (N. Y.) 451; *People vs. Kingston*, 23 Wend. (N. Y.) 195; R. S. 181; 16 An. 98, 190; 38 An. 815; Bigelow on Estop. 485-6.

Henry P. Dart, C. H. Luzenberg and Frank Zengel Attorneys for Defendant and Appellee:

Statute No. 25 of 1890 does not define the crime of prize fighting with such distinctness as to enable the Court to establish what is or is not prize fighting under the laws of Louisiana.

Reference made to any other system or code of laws, to obtain a definition of a crime in this State, is prohibited by the Constitution of 1879, and by well settled decisions: *State vs. Gaster*, 45 An. 636, and *State vs. Smith*, 30 An. 846.

The proviso of the statute exempting from its provisions "glove contests and exhibitions between human beings in the rooms of regularly chartered athletic clubs" is intended to promote boxing and sparring contests, and such contests are not prize fights within the proscription of the statute, nor can they be found to be prize fights under this examination, more especially when it is established by the evidence that they were contests with gloves accompanied by no disorder, by no unlawful assemblages, and held under strict police surveillance, and within the rooms of a regularly chartered athletic club.

The State can not maintain this action, because she has proceeded against the defendant for a State license, based on its receipts from the contests now complained of. 28 An. 462; 84 An. 359; 31 An. 158.

The forfeiture of a charter will not be lightly decreed when a full and complete remedy exists to prevent the infraction of the law complained of, and the policy of the court should be to maintain the charter of a corporation which exists for other useful and legal purposes, when the objectionable features may be prohibited by injunction.

The opinion of the court was delivered by
WATKINS, J. The plaintiff's suit is for the revocation and forfeiture of the defendant's charter, on the ground and for the reason

State vs. Olympic Club.

that it has committed acts *ultra vires* and transcended the powers granted by its charter, and conferred upon it by law, in that the corporation, through its officers and agents, has fostered, encouraged and maintained exhibitions of what is "*commonly called prize fighting*," in violation of the Constitution and laws of this State.

Accompanying the foregoing averments is a prayer for an injunction, restraining and prohibiting the corporation, its officers and agents from maintaining, fostering and encouraging such exhibitions; and also enjoining and prohibiting the defendant from selling or disposing of its property *pendente lite*.

The prayer is concluded by demand for the appointment of a receiver to take charge of its assets and property, and to liquidate and wind up its affairs.

In the petition are set forth the various objects and purposes of the defendant's organization, as they are enumerated in its charter and the amendment thereto—such as the establishment and maintenance of rooms for literary purposes, for the collection of valuable works of art, books, maps, charts, statuary, coins, etc.; for the promotion of social intercourse, enjoyment, comfort, harmony, refinement of manners and intellectual improvement; to encourage physical culture and development of athletic exercises—such as boxing, wrestling, fencing, and exhibitions of athletic sport; to organize one or more military companies, to promote and maintain a natatorium, gymnasium, athletic grounds, rowing clubs, bowling alleys, and such other features as may be found necessary to fulfil the purposes for which this corporation is formed.

Then follows the averment that, "the acts of the incorporation were a fraud upon the laws of the State—the vague and indefinite language employed to express the objects and purposes of the club (being) purposely used to cloak, cover up and conceal the *real* objects for which said corporation was organized," as set out *supra*.

As adjuvatory of the foregoing allegation, the further averment is made that the defendant is accustomed to offer large prizes, or rewards, to noted pugilists of other States and countries, and its arena has been the scene of prize fights that were participated in by them—intending to fight until one of the contestants should give in from sheer exhaustion or injuries received; that the fights were witnessed by large assemblies of persons, there unlawfully congregated

State vs. Olympic Club.

for the purpose of encouraging same, who were compelled to pay entrance fees for admission to said exhibitions.

It is then further averred that such *unlawful assemblies and acts*—which were *public nuisances*—were instigated and maintained by the club. That “these disgraceful exhibitions have attracted to this city a large number of noted thugs, confidence men and criminal characters from other cities and States, thereby endangering the public peace and menacing the security of life and property.”

That “these exhibitions are and have been an incentive to gambling, and large sums of money have been bet, wagered and staked on the result thereof;” and that the defendant “has been offering and paying large sums of money to noted pugilists, and has caused and encouraged them thereby to commit assault and battery upon each other;” and that “said prize fights set evil examples to the young, discourage honest industry by disproportionately rewarding sanguinary exhibitions of brute force—all of which are public nuisances.”

It is then alleged that a large number of said exhibitions have taken place at the club house of the defendant, by the direction and under the sanction and authority of its officers and agents, and that “the said exhibitions of what is commonly called prize fights” have taken place on the dates and between the participants named in the accompanying list, to-wit:

Fighters.	Date.	Prize.	Prize Amount rec'd by Winner.	Amount rec'd by Loser.
1. Thos. Ward	— —	\$400	\$300	\$100
2. Kid Wilson				
3. Jim Carroll	Sept. 16, 1890	3,000	2,500	500
4. Andy Bowen				
5. Bob Fitzsimmons.....	Jan. 14, 1891	10,000	9,000	1,000
6. Jack Dempsey				
7. Cal. McCarthy.....	Sept. 22, 1891	1,500	1,000	500
8. Tom Warren.....				
9. J. Griffin.....	Nov. 19, 1891	2,500	2,000	500
10. J. Larkin.....				
11. Billy Meyer.....	Dec. 22, 1891	5,000	4,500	500
12. Jim Carroll.....				
13. Cal. McCarthy.....	Jan. 27, 1892	2,000	1,500	500
14. Tom Callaghan.....				
15. Bob Fitzsimmons.....	March 2, 1892	10,000	9,000	1,000
16. Pat Maher				
17. Jas. McAuliff	Sept. 5, 1892	10,000	9,000	1,000
18. Billy Myer.....				
19. Geo. Dixon, a negro	Sept. 6, 1892	7,500	7,500	—
20. J. Skelly				
21. Jas. Corbett	Sept. 7, 1892	25,000	25,000	—
22. Jno. Sullivan				

State vs Olympic Club.

Fighters.	Date.	Prize.	Prize Amount rec'd by Winner.	Amount rec'd by Loser.
12. Billy McMillan	March 2, 1893	\$800	\$600	\$200
13. N. Smith	March 31, 1893	10,000	5,500	1,500
14. J. Goddard	April 6, 1893	2,500	1,250	1,250
15. Andy Bowen	May 31, 1893	2,000	2,000	—
16. J. Everhardt	Sept. 20, 1893	2,000	1,700	300
17. J. Van Heest	Oct. 17, 1893	1,000	700	300
17. W. Napier				
17. J. Gorman				
17. J. Levy				
		\$36,200	\$36,050	\$9,150

The petition further and finally alleges that, in conjunction with said exhibitions or prize fights, the defendant, on occasions on which same occur, operates and conducts a bar-room and retail liquor establishment upon its premises without paying a license to the State, as required by law.

The defendant moved to dissolve the injunction on several grounds, to-wit:

1. That the injunction was not justified by the facts and allegations contained in the petition.
2. That the writ was improvidently issued and without cause.
3. That the petition sets forth no cause for or right to an injunction.
4. The allegations on which the injunction was demanded are untrue.
5. That the plaintiff is estopped by her conduct and allegations in the suit of same title as the instant one, for the recovery of a license.

Contemporaneously therewith, the defendant filed exceptions to the *suit* of no cause of action, prescription of one year, and estoppel laid on aforesaid record.

All of said exceptions were cumulated with the merits and tried together, the defendant having in the meanwhile filed an answer, alleging that it was "and is a solvent and existing corporation, lawfully established, and is in the legal and actual possession of all its property, rights and privileges, and has in no manner abandoned the same, or incurred any liability to forfeiture thereof."

The case was tried by a jury, who returned a verdict in favor of the defendant, and plaintiff has appealed.

State vs. Olympic Club.

A fair summary of the charges made by the plaintiff, upon the proof of which the forfeiture of defendant's charter and the perpetuation of her injunction depend, is as follows, to-wit:

First: That the corporation had committed acts *ultra vires*, and transcended the powers conferred upon it by its charter and the law, by encouraging and maintaining exhibitions of what is "commonly called prize fighting," in violation of the Constitution and the law.

Second: That the defendant is accustomed to offer large prizes or rewards to noted pugilists, and its arena has been the scene of prize fights that have been participated in by them—intending to fight until one of the contestants should give in from sheer exhaustion or injuries received—and which were witnessed by large assemblies of people, unlawfully congregated for the purpose of encouraging same; which assemblies and acts constituted public nuisances, and same were instigated and maintained by the defendant.

Third: That these exhibitions have attracted a large number of noted thugs, confidence men and criminal characters from other cities and States, thus endangering the public peace.

Fourth: That these exhibitions are and have been an incentive to gambling, and large sums of money have been wagered and staked on the result thereof; and the defendant has been offering and paying large sums of money to noted pugilists, thus causing them to commit assault and battery.

Fifth: That, in conjunction with said exhibitions or prize fights, the defendant operates a bar-room and retail liquor establishment upon its premises, without paying a license to the State.

The *gravamen* of the suit is found in the first specification, and is to the effect that the defendant committed acts *ultra vires* of its charter, by encouraging and maintaining on its premises and within its club room "exhibitions of what is commonly called prize fighting, in violation of the Constitution and law—thus making its acts of incorporation a fraud on the law.

The remaining four specifications relate to the collateral incidents and surrounding circumstances illustrative of the exhibitions, as an aggravation of the charge complained of.

The solution of the question propounded by this action depends *first* upon a correct and proper interpretation of the phrase "exhibitions that are commonly called prize fights;" and *second* upon a just

State vs. Olympic Club.

interpretation of the laws which are alleged to have been thereby violated.

As pointing the issue thus formulated we make the subjoined extract from the plaintiff's brief, viz.:

"The questions at issue may be stated thus: Were these pugilistic fights for prizes, held in the arena of the Olympic Club, within the legitimate objects and purposes of the charter, or were they such abuses of its franchises as would justify a perpetual injunction and a decree of forfeiture of the charter and the appointment of a receiver to sell its property and distribute its proceeds among creditors and stockholders?

"Were they not 'what is commonly called prize fights;' and did not each fight constitute the crime or offence of assault and battery and breach of the peace; and were they not in violation of the law and public policy of the State? or were they lawful exhibitions of skill in boxing, permissible under the law, or as the defendant is pleased to call them 'glove contests,' whatever precisely that may mean."

The provisions of Act 25 of 1890 are referred to and relied upon as having been violated by the defendant, and same are distinctly invoked and quoted by the plaintiff's counsel as the basis of this proceeding.

That act is couched in the following terms, to-wit:

"Act No. 25 of 1890, defining the crime of prize fighting and to provide for the punishment thereof in and out of the State of Louisiana.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That any person who shall send or cause to be sent, publish or otherwise make known, a challenge to fight what is commonly called a prize fight, or who shall accept any such challenge, or who shall engage in such fight, or act as trainer for any such, contemplating a participation in such fight, and any such person who shall act as aider or abettor, backer, umpire, second, surgeon or assistant at such fight, or in preparation for such fight, shall, upon conviction thereof, be deemed guilty of a misdemeanor and be punished by imprisonment in the parish jail for not more than six months, and be fined not more than five hundred dollars."

(Section 2 is omitted as unimportant.) But to this section is appended the following proviso, to-wit:

State vs. Olympic Club.

"Provided this act shall not apply to exhibitions and *glove contests* between human beings *which may take place within the rooms of regularly chartered athletic clubs.*"

Previous to the promulgation of this act on the 25th of June, 1890, an ordinance was adopted by the City Council of New Orleans, of the following tenor and purport, to-wit:

"Be it Ordained by the City Council of the City of New Orleans, That Ordinance No. 1194 be and the same is hereby amended so as to read as follows:

"That exhibitions and glove contests between human beings for the development of muscular strength be and the same are hereby permitted to take place within the rooms of all regularly chartered athletic clubs in the City of New Orleans, provided that at the time when said exhibitions and glove contests shall take place that the sale or giving of spirituous liquors in said club rooms is hereby prohibited; and provided further, that all such exhibitions and glove contests shall be under the supervision of the police authorities of the City of New Orleans; and provided further, that a glove weighing not less than five ounces shall be used in such exhibitions or contests; but under no circumstances shall this ordinance be construed as permitting any sparring contests in such club or clubs on Sunday; provided further, that for each exhibition the parties shall be required to donate fifty dollars for fund of public charities of New Orleans; and that a good and solvent bond of five hundred dollars cash shall be given, to be forfeited in case of any violation of said ordinance, the proceeds of said forfeited bond to go to the said fund of public charities."

The foregoing ordinance bears the number 4836, C. S., and was adopted by the City Council on March 5, 1890.

It was with direct reference to this ordinance, and the act of the General Assembly, that the defendant procured an amendment to its original charter, whereby on the 16th of May, 1891, it was reincorporated as a stock company, the objects and purposes of the corporation being therein enumerated as set out in plaintiff's petition.

From the City Ordinance it appears "that exhibitions and glove contests between human beings, for the development of muscular strength," was "permitted to take place within rooms of regularly chartered athletic clubs in the City of New Orleans;" coupled, however, with the proviso "that all such exhibitions and glove contests

State vs. Olympic Club.

shall be under the supervision of the police authorities;" and with the further proviso "that a glove weighing not less than five ounces shall be used in such exhibitions, or contests."

The denunciation of the Legislature was addressed to "*what is commonly called a prize fight*," and declares that any one who shall send or accept a challenge to make such a fight shall be deemed guilty of a misdemeanor, and punished accordingly; but it was careful to insert the proviso that it should not apply to exhibitions and glove contests which may take place in regularly chartered athletic clubs.

Having reproduced the allegations of the petition, the averments of the answer, the purport of the argument, the provisions of the City Ordinance and of the statute of the General Assembly, and the provisions of the defendant's charter, the conclusion is plain that our decision must turn upon the distinction that is taken in the statute and ordinance between a glove contest and what is commonly called a prize fight; for upon this distinction depends the criminality *vel non* of the contests which took place between the combatants. And it is equally clear that unless these combatants are proven guilty of the acts denounced in the statute as a misdemeanor, the defendant can not be treated as *particeps criminis* and its charter revoked and like contests enjoined.

This brings us to the consideration of the evidence that was adduced, *pro et con*, in the lower court, and the various rulings of the judge *a quo* with reference to admissibility of testimony.

And, as a preliminary to this examination, it is well to incorporate one of the contracts under which the club contests occurred, as the best means of illustrating its character; and the following is selected as a sample, to-wit:

"OLYMPIC CLUB.

"ARTICLES OF AGREEMENT BETWEEN STANTON ABBOTT AND
ANDREW BOWEN.

"We, the undersigned, Stanton Abbott, of London, England, and Andrew Bowen, of New Orleans, La., do hereby agree to engage in a glove contest to a finish before the Olympic Club, of New Orleans, La., on November 15, 1893, at 9 o'clock P. M. sharp, for a purse of two thousand five hundred dollars, the winner to receive two thousand dollars, and the loser five hundred dollars of said purse, said

State vs. Olympic Club.

Bowen and Abbott to receive each three hundred dollars for expenses as soon as forfeit of five hundred dollars is deposited with the Olympic Club.

"The contest to be with five-ounce gloves and according to Marquis of Queensbury rules. The club is to select the referee and official timekeeper, each of us reserving the right to appoint a timekeeper to represent us, said timekeeper to be subject to the approval of the club. The referee shall have the power to stop and decide the contest when so directed by the seconds and the contest committee.

"Should either of us commit a deliberate foul, thereby injuring the other's chances of winning, the one so doing shall lose all interest in the aforesaid purse.

"We each hereby agree to weigh one hundred and thirty-three pounds at the ring side at 9 o'clock P. M. on day of said contest.

"To guarantee the faithful performance of the above obligations we each hereby agree to deposit the sum of five hundred dollars in the hands of the Olympic Club. Should either of us fail to appear at the proper time and place, the one so doing shall forfeit his deposit to the club.

(Signed)

"A. BOWEN,

"STANTON ABBOTT,

"Jno. W. Lyons.

"Witnesses:

"Thos. C. Anderson,

"Alb. Spitzfaden,

"Teddy Wilson.

"Date September 25, 1893."

During the progress of the trial question was made with regard to the admissibility of testimony on the part of the defendant, as tending to show a difference between a prize fight and a glove contest. The judge *a quo* ruled in favor of the defendant and admitted the evidence, and the plaintiff reserved a bill of exceptions.

After the evidence had gone to the jury the same question was presented again, in certain requested instructions to the jury, that were presented by the plaintiff's counsel, and refused by the court. To be accurate, we will incorporate the pertinent portions of the charge requested, which is as follows, viz:

"The plaintiff requests the Judge to charge the jury as follows:

"1. The statute of this State, which applies to both persons and corporations, prohibits prize fighting, and makes it a penal offence; and also provides that this statute shall not apply to exhibitions and glove contests between human beings which may take place within the rooms of regularly chartered athletic clubs.

"All parts of this statute, as well as every other law, must be so construed as to harmonize with each other, and I charge you, gentlemen of the jury, that the term 'prize fighting' does not require any definition—it is a simple term defined in all the dictionaries to be fighting for a prize or reward, and if the jury believe from the evidence that the defendant corporation held one or more fights within its arena, under the auspices of its officers and managers, in which the fighters were offered or promised a prize or reward to be paid to the victor, or either of them, such a fight is a 'prize fight' within the meaning of the law, and is unlawful, whether the combatants wore gloves or not.

"It matters not what the rules of the fight were, or how they were clothed, or whether any portions of their bodies were covered or uncovered—if they fought to a finish for a prize, or reward, to be given to the successful combatant, it is a prize fight within the meaning of the law, and the verdict must be for the plaintiff.

"The Legislature can not be presumed, in prohibiting prize fighting, to have enabled any one to escape the prohibitory or penal clauses of the statute, by putting on and wearing a pair of gloves, and thereby evading the penalty prescribed by the law for its infraction."

But, to our thinking, the foregoing requested special charge was modified, and the admissibility of *such* evidence—partially, at least—conceded by the *third* and *fourth* requested special charges, which are as follows, viz.:

"I charge you, gentlemen of the jury, that if from the evidence you find that the defendant in this case contracted or agreed with certain noted pugilists, residing here or coming here from other States or countries, to engage in a fight for a prize or reward, in the arena of their club, and at such contests the fights were carried on to a finish, and the reward previously promised was subsequently paid to the successful combatant, then this was a 'prize fight,' and your verdict should be for the plaintiff.

"If it were a mere exhibition of skill in sparring with gloves, not

State vs. Olympic Club.

calculated to do great bodily injury, it was a glove contest within the provision of the law; but if the jury believe from the evidence that the parties who have engaged in these contests within the arena of the defendant intended to fight until one gave in from exhaustion or injuries received, it was a breach of the law, and a prize fight, whether the combatants fought with gloves or not.

"Gentlemen of the jury, you are to decide this case from the evidence adduced on the witness stand as to what actually occurred at the time the several contests or fights referred to in the petition, and testified to by witnesses, took place, and not by your preconceived opinions, or the opinions of any other person, as to whether these contests were prize fights or not. In other words, you are to decide this case upon the facts proven by the testimony of the witnesses on the stand, and the law as given to you by the court, and not in accordance with your preconceived opinions, or according to the opinion of any one else."

Taken collectively, we understand the objection of plaintiff's counsel to be, that it was permissible for witnesses to state the *facts and incidents* which actually occurred, as coming within the range of their personal knowledge and observation; but, that it was not permissible for them to give their opinions, based upon that knowledge and information—same being a conclusion of law, and not a matter for determination by expert testimony. To the judge's declination to give the jury this special charge, no bill of exceptions was retained on behalf of the plaintiff, and the State is to be considered as having abandoned it and acquiesced in the charge that was given by the judge, and which is as follows, viz.:

"There is only one question for the jury to decide, and that is as to the character of the exhibitions given at the Olympic Club.

* * * * *

"The burden of proof is on the plaintiff to make out its case. The defendant is charged here with having violated the terms and conditions of its charter by having given, under its auspices, what is commonly called prize fights.

"The defendant resists that charge on the ground of a proviso in the law which permits glove contests. There is then but one question before you, 'Does the evidence disclose that these exhibitions were prize fights or not; or does the evidence disclose that they were glove contests or not?'

State vs. Olymple Club.

"Now the rule of interpretation of words is that they must be received according to their significance in common use.

"I am not an expert, and can give you no opinion as to the significance of these words. You must determine for yourselves whether, in common parlance, these exhibitions were *prize fights* or *glove contests*. There is no other law in this case."

No objection was made to this charge, and no bill of exceptions was retained by the plaintiff to it.

When the counsel for the State presented the aforesaid special charges, the judge declined to give the jury *any other charge* than the one above quoted—stating, however, that "this is not a *criminal* prosecution, but that it is a *civil prosecution*, for the forfeiture of defendant's charter;" reading to the jury Act 25 of 1890.

The acquiescence of the plaintiff in the judge's *estimate* of this controversy is plainly indicated by the paragraph we clipped from its brief, at page 10, which we reproduce in this connection for the purpose of *emphasizing* the correctness of the judge's conclusions:

"Were they not 'what is commonly called prize fights,' and did not each fight constitute the crime or offence of assault and battery, and a breach of the peace, and were they not in violation of the law and public policy of the State? Or, were they lawful exhibitions of skill in boxing, permissible under the law; or, as the defendant is pleased to call them, 'glove contests,' whatever precisely that may mean?"

On the face of the statute against prize fighting—Act 25 of 1890—the denunciation of the law is against "any person who shall send or cause to be sent, publish, or otherwise make known, a challenge to fight *what is commonly called a prize fight*"—not a prize fight *eo nomine*.

And that denunciation is coupled with the *proviso*, "that this act shall not apply to exhibitions and *glove contests* between human beings, *which may take place within the rooms of regularly chartered athletic clubs*."

That is the only statute governing such contests, or exhibitions, to which we have been referred, or of which we are aware; and it is controlling, and conclusively affirms the correctness of the view entertained by the District Judge.

Accepting this as the correct theory of this case, it is manifest that the judge ruled correctly in admitting the evidence objected to, and

State vs. Olympic Club.

in refusing to give the special charge requested by plaintiff's counsel. For it can not be readily perceived on what theory expert testimony should have been excluded, when the *main* question for the jury to determine was the proper significance of "what is *commonly called* a prize fight," as contradistinguished from a "*glove contest*."

Addressing ourselves to the definition of these terms, we are to ascertain the distinction between them in common parlance; that is to say, to ascertain their true significance in the vernacular of the prize ring and athletic club, where such exhibitions are given.

Taking the contract between Bowen and Abbott as a sample of the articles of agreement between the contestants before the Olympic Club, we find that it declares they "do hereby agree to engage in a glove contest," and that it further stipulates that "the contest (is) to be with *five-ounce gloves*, and according to *Marquis of Queensbury rules*." It also provides that if either party shall "commit a deliberate foul, thereby injuring the other's chances of winning, the one so doing shall lose all interest in the aforesaid purse."

City Ordinance No. 4386 provides "that exhibitions and *glove contests* between human beings, for the development of muscular strength, be and the same are hereby permitted to take place within the rooms of *all regularly chartered athletic clubs in the City of New Orleans*." That ordinance provides further, that in such contests "*a glove weighing not less than five ounces shall be used*."

We have extracted from the little volume entitled Billy Edwards' Art of Boxing and Manual Training, which was introduced and filed in evidence by the Attorney General, on the part of the plaintiff, as immediately bearing on the contracts of the Olympic Club contestants, the *Marquis of Queensbury rules*.

The extract is from p. 109, and is as follows, to-wit:

THE MARQUIS OF QUEENSBURY RULES, FOR THE ENGLISH CHALLENGE
CUPS (OPEN TO GENTLEMEN AMATEURS).

* * * * *

"Rule 4. There are to be three judges appointed by the committee.

"Rule 5. That the boxing is to take place in a 24-foot ring.

"Rule 6. That no wrestling, roughing, or hugging the ropes (is to) be allowed.

Rule 7. That each heat consists of three rounds, with one minute

State vs. Olympic Club.

interval between each; the duration of each round to be at the discretion of the judges, but not to exceed five minutes.

"Rule 8. Any competitor not coming up to time shall be deemed to have lost.

"Rule 9. That no shoes or boots with spikes or sprigs be allowed.

* * * * *

"Contests for Endurance.

"Rule 1. To be a fair stand-up boxing match in a 24-foot ring, or as near that size as practicable.

"Rule 2. No wrestling or hugging allowed. The rounds to be of three minutes' duration and one minute time.

"Rule 3. If either man fall, through weakness or otherwise, he must get up unassisted, ten seconds to be allowed him to do so, the other man to retire meanwhile to his corner, and when the fallen man is on his legs the round is to be resumed, and continued until the three minutes have expired; and if one man fails to come to the scratch in the ten seconds allowed, it shall be in the power of the referee to give his award in favor of the other man.

"Rule 4. A man hanging on the ropes in a helpless condition, with his toes off the ground, shall be considered down. * * *

"Rule 6. The gloves (are) to be fair-sized boxing gloves of the best quality, and new.

* * * * *

"Rule 8. A man on one knee is considered down, and if struck, is entitled to the stakes."

As contradistinguished from the foregoing, we refer to the manual of Billy Edwards, at page 103 *et seq.*, containing the *London Prize Ring Rules*, from which we find the only distinguishing features to be: (1) that the contests are made *without gloves* or other covering for the hands; (2) that the fighting boots of the contestants are provided with three metal spikes, which are one-eighth of an inch broad, and extend three-eighths of an inch from the sole, one to be placed on each side of the boot near the toe and the other at the heel; (3) that wrestling, roughing and hugging are not forbidden, all the prohibitions being attempts to inflict injury by gonging, tearing the flesh with the finger nails and biting.

Contests under the London Prize Ring Rules are usually outdoors, in open, public view.

State vs. Olympic Club.

With these rules kept in view, the evidence will disclose whether the Olympian contests were glove contests or prize fights, as the major part of the witnesses were *connoisseurs* in matters of this sort, if not *experts*, scientifically speaking.

The plaintiff only introduced four witnesses, gentlemen who had witnessed some of these contests as reporters of the newspapers, whose testimony was chiefly directed to the *consequences* of them rather than to the *modus operandi* of their management. But on this subject the evidence of the defendant is full, and therefrom we find the following summary of facts and extracts from the testimony of witnesses.

During the examination of one of the most prominent of the witnesses the following occurred, viz.:

" Q. Have you ever seen any of the contests at the Olympic Club, which are sometimes called glove contests, and which the State now calls prize fights?

" A. I have seen several of them.

" Q. Can you mention any of the names of the contestants?

" A. I saw the Sullivan-Corbett contest; I saw the Fitzsimmons-Maher contest, and I saw the contest between Bowen and Meyer, of Illinois.

" Q. Did you see the McCarthy-Warren contest?

" A. Yes, I saw that fight.

" Q. Take the Corbett-Sullivan fight and describe what you saw at that fight.

" A. Well, I saw the gentlemen come into the ring and take the respective corners assigned to them and prepare themselves for the contest. They prepared themselves by divesting themselves of their clothing, except (their) trunks and shoes, and covering their hands with gloves. Then, after the other preliminary arrangements were made, under the rules and regulations governing the contest, time was called, and they were then engaged in their boxing contest.

" They appeared in the centre of the ring and commenced the boxing exercise—boxing against each other the best way they could, in order to strike one another and to get what advantage they could, under the rules and regulations of the contest, by striking, parrying blows, dodging or retreating, doing all they could in that way to *save themselves from injury and to administer injury to the opposite*

State vs. Olympic Club.

party, in a sporting and friendly manner, under the rules and regulations for that character of contest. (Our italics.)

"I saw them through the contest, which consisted of twenty-one rounds of three minutes each.

"They were required to remain contesting each round for three minutes. After each round they were given one minute's rest, during which they were refreshed by their respective attendants; after which the contest was resumed for another three minutes, and so on until one or the other either surrendered, or was rendered incapable to the call of the contest.

"Q. Do you know anything of what is commonly called boxing?

"A. Yes, sir.

"Q. Have you any skill in it yourself?

"A. Not a great deal; I have boxed some in former years.

"Q. Do you feel competent to define the physical act that these men committed?

"A. I will say, then * * * that what I saw is what I *would call boxing to determine the superior excellence, science and endurance* of the parties to the contest. They were governed by certain rules and regulations which had been prescribed. And each contestant is compelled to conform to those rules and regulations, and *while doing so they use all the skill and strength in their possession, each endeavoring to strike the other—using all the tactics in their possession in order to defend themselves from the blows of each other.* And they do this, as I said before, by retreating, by dodging, and by parrying the blows. *It is very seldom that either one of them gets a square, direct, hard blow, because the blow is either parried or dodged, or they retreat, or they close into each other, and lock arms, in order to protect themselves from the force of the blow. That is the case in the exercise of boxing, whether it is for fun, for a prize, or otherwise; it is the same character of exercise.*

"Q. You used the word 'skill;' what do you mean by that?

"A. I mean the skill, or science, or expertness of the parties to defend themselves, each from the blows of the other, and at the same time to strike the other. It is an exercise that is capable of being carried to a very high degree of skill and science, both in the manner of striking and in the manner of defending, retreating and dodging—all of which make up the whole exercise.

State vs. Olympic Club.

"It is a contest for physical supremacy, physical superiority, endurance, skill and strength.

"Q. It is, also, called 'the manly art of self-defence,' is it not?

"A. Yes. The manly art of self-defence. That is a comprehensive term applied to the art of boxing.

* * * * *

"Q. Did you ever see a prize fight, commonly so-called?

"A. Yes, sir.

"Q. Which one did you see?

"A. I saw the Sullivan-Ryan fight. *That is the only prize fight that I ever saw.*

"Q. Is there any difference between that contest and the contest you have seen in the Olympic Club?

"A. I can state the facts, and what was done at the contest between Sullivan and Ryan. They entered a ring similar to that of the other contests we have been speaking of, but they were differently prepared.

"They had naked fists, and they continued the contests in a more severe manner, and continued the exercise until one or the other had fallen or was knocked down. Then they were allowed to wrestle, and they were allowed to fall upon one another, when they did (fall). They were allowed to take advantage in their efforts to strike or injure each other. That they were not allowed (to do) in the other contests of which we have been speaking. Then, as soon as the round had been completed by either one of them falling, they then retired to their respective corners, but only had a half-minute's rest, when time was called.

"Q. (By the court): That was in case of the Sullivan and Ryan contest?

"A. Yes, sir. They only had a half a minute's rest, after each round, and a round continued up to the point when either of them fell; either of his own volition, or from the effect of a blow, a slap or a wrestle. The contest continued in that way until one of them had gained sufficient superiority over the other to justify the other's seconds to throw up the sponge. That contest, I think, lasted seven rounds, when the seconds of Ryan threw up the sponge—that is, simply surrendered the contest and admitted that Mr. Sullivan was the superior pugilist.

State vs. Olympic Club.

* * * * *

"Q. Were the contestants arrayed as they were in the contests before the Olympic Club?

"A. No. *The shoes were heavier, and they were allowed to have spikes in their shoes, and their hands were not gloved.*

* * * * *

"Q. Did the Sullivan-Ryan contest that you speak of take place in the open air?

"A. Yes; it took place in the open air.

* * * * *

"Q. Were any of the contestants injured in any of those contests which you witnessed at the Olympic Club?

"A. In some cases they received slight injuries.

"Q. Whereabouts?

"A. In the Maher-Fitzsimmons fight, Maher received a slight injury by the bruising of his lip, and perhaps a little to the nose—sufficient to cause some little flow of blood. It is claimed quite a considerable of a flow of blood. I saw some blood, but I saw no serious injury.

"Q. You saw no serious injury to any one?

"A. I have never seen any one of the contestants seriously injured.

"Q. Have you witnessed those contests from beginning to end?

"A. Yes; I have witnessed all the principal contests we have had here, from beginning to end."

We have selected the testimony of this particular witness because of his being a typical representative of the conservative element of this community, the president of a college, and a man apparently possessed of accurate and careful information on the subject, as furnishing the most concise *exposé* of the Olympic Club contests, as he seems to have witnessed the greater number of them, and closely observed them from a scientific standpoint.

The next witness to whose evidence our attention has been attracted is a prominent city official, who states that he has seen nearly all of the contests at the Olympic Club—and specially mentions the Sullivan-Corbett contest.

He says that he witnessed the Sullivan-Ryan fight at Mississippi City, Miss., and Sullivan-Kilrain fight at Richburg, Miss., and says they were prize fights.

State vs. Olympic Club.

"Q. Now, will you kindly tell me what, if any, difference there was between that prize fight between Sullivan and Kilrain and the contest which you saw at the Olympic Club?

"A. Well, the rules for sparring contests are not observed in the London prize ring rules. For instance, in a glove contest the rules require that when the contestants come together and clinch, they must separate, and if they do not, the referee separates them by force. But you can not do that under the London prize ring rules. Under the London prize ring rules the contestants can clinch, and stand and thump and punish until one or the other goes down. That is not tolerated in a glove contest. Then, under the London prize ring rules they are not limited as to the time they shall have for each round. In a glove contest they are. Then, under the London prize ring rules they wear spiked shoes, and in those contests they are not allowed to use them. Under the London prize ring rules they fight with the bare knuckles, while in these contests they must wear gloves weighing not less than five ounces," etc.

The next witness whose testimony has attracted our notice is a prominent lawyer, who furnishes a like description of the Olympian contests as the first witness did.

He says these contests were conducted with a high degree of skill, the participants exhibiting a great deal of skill. The men who participated in those contests were men of scientific training—almost without an exception. He does not think any of the contestants were hurt very much. He saw one or two of them bleeding from the nose or mouth, and possibly saw one bleeding from the ear. States that he witnessed the Sullivan-Kilrain fight in Mississippi, and describes it very much as the second witness does.

The next witness is a police commissioner, and he was present and witnessed most all of the contests which took place at the Olympic Club. Having heard the testimony of the last preceding witness he corroborates it in every particular. States that he considered the contest between Corbett and Sullivan as one of the greatest fights that ever took place, as far as skill and science was concerned.

The next witness is a leading lawyer of the New Orleans bar. He states that he witnessed several of the Olympic Club contests, and instances the Corbett-Sullivan contest, which he describes much in the same manner as other witnesses have done. That he saw nothing that was objectionable or brutal in that contest. He testifies—

State vs. Olympic Club.

as other witnesses had done—that the assemblage of people who witnessed these contests was orderly and well behaved. Or, as the first witness states, these assemblages of people, in point of personal respectability and behavior, were above the average of ordinary political assemblages.

He states he heard the testimony of the third witness and corroborates it throughout. This witness is a member of the school board and a gentleman of first respectability.

The next witness is also a prominent city lawyer of high reputation and a man of affairs. He states that he has witnessed quite a number of the Olympic Club contests, and his description of them and the manner in which they were conducted is quite the same as that of other witnesses whose testimony we have commented on.

His description of the effect of these contests upon the contestants, physically, is quite unique.

“Q. The exhibitions which you have described, were they at any time bloody, or (was) blood shed during any of those contests?”

“A. Well, when two men get opposite to each other and begin boxing, unless one has a pretty tough nose, there is going to be a bloody nose. I have had a bloody nose myself twenty times when I was taking boxing lessons,” etc.

With regard to the cruelty or brutality of the Olympic contests, this witness' statement is also quite unique.

“Q. Was there anything brutal or inhuman about it?”

“A. In my judgment, no sir. As compared with that popular game nowadays (known) as foot-ball, which I think the American people have gone crazy about, the contests that I have seen at the Olympic Club are superior in every respect, and in point of humanity and as appealing to the esthetic senses,” etc.

He states that the contestants were scientific and artistic in the management of their hands.

“They were experts in boxing. It is commonly called the manly art of self-defence, both in England and in this country.”

Quite a number of other witnesses—lawyers, doctors and professional experts—were called and gave evidence quite in line with the statements we have detailed.

On the other hand, a fair summary of the testimony of the plaintiff's witnesses does not materially differ from that of the defendant's, except as to the *manner* and *result* of these contests.

State vs. Olympic Club.

One witness said that he saw blood running from the ear of one of the contestants in the Goddard-Smith contest—"just a little." He speaks of the Fitzsimmons-Maher fight as a "bloody fight." He says that in the Sullivan-Corbett contest Sullivan bled at the mouth and nose. He says that in the McCarthy-Callaghan contest the lip of the former was much swollen. Another witness speaks of some of the contestants shedding blood, but his memory of details was not accurate. The case of Maher, in the contest with Fitzsimmons, is the only one about which he is at all positive.

The following cross-examination of this witness is worthy of note, as characterizing these contests, viz.:

"Q. Did you see any of those men bite each other?

"A. No, sir.

"Q. Did you see them wrestle with each other, throw each other down, or jump on one another?

"A. No, not intentionally.

"Q. This butting you speak of on the part of Smith was accidentally (done), was it not?

"A. I don't think he fought fairly.

"Q. You don't think he was a fair fighter?

"A. No, sir.

"Q. The referee had to stop him?

"A. They warned him two or three times about it.

"Q. But there was no kicking of each other?

"A. No, sir.

"Q. They fought, I understand, with five-ounce gloves?

"A. Yes.

"Q. They squared themselves for the fight, and from that moment on it was give and take?

"A. Yes.

"Q. Each man trying to land his blows above a certain point?

"A. Yes.

"Q. Above his belt?

"A. Yes.

"Q. And they used their hands and nothing but their hands, until the gong struck 'time' for the fighting to end?

"Q. And the round lasted three minutes?

"A. Yes."

The testimony of the other witnesses of the plaintiff is much of the

State vs. Olympic Club.

same tenor as that of the two whose evidence we have quoted, and and little is left us to say in the way of comment. We have only to answer for ourselves the question the judge's charge propounded to the jury. Does the evidence show that these exhibitions were what are commonly called prize fights or glove contests? We are to make answer to the questions propounded by the State of Louisiana through her Attorney General, viz.: Were these contests what are commonly called prize fights? and did each fight constitute an assault and battery, and a breach of the peace? and were they not in violation of the law and the public policy of the State?

Or were they lawful exhibitions of skill in boxing, permissible under the law? or, as the defendant puts it, glove contests recognized by law?

We have only to recur to the instructions that plaintiff's counsel requested the Judge to give in charge to the jury, for a guide, in making answer to these queries.

They say: "If it were a mere exhibition of skill in sparring with gloves, *not calculated to do great bodily injury*, it was a glove contest, within the provision of the law."

They further say: "Gentlemen of the jury, you are to decide this case from the evidence adduced on the witness stand *as to what actually occurred* at the time the several contests or fights referred to in the petition, and testified to by witnesses (took place), and not by your preconceived opinions, or the opinions of any other person, as to whether these were prize fights or not. In other words, you are to decide this case *upon the facts proven by the testimony of the witnesses on the stand, and the law, as given you by the Court*, and not in accordance with your preconceived opinions or the opinions of any one else." (Our italics.)

Testing the issue presented by the evidence we have detailed—and it is of a kind that all of the evidence is—and the law as given by the court (and that was the reading to the jury of Act 25 of 1890) and there is *only one* conclusion to which we *could* come, and that is the one at which the jury arrived, to-wit: that the Olympic Club contests were ordinary glove contests within the *terms* of that statute, and not "what are commonly called prize fights."

Coming within the provisions of a special statute, such contests could not be esteemed assaults and batteries, or as breaches of the peace, unless the evidence should disclose that they were calculated

State vs. Olympic Club.

"to do great bodily injury." But the evidence will be examined in vain for any such proof; for its substance and general tenor is to the effect that these contests were but trials of the skill and powers of physical endurance between well-equipped athletes, and that, being trained in this so-called "manly art of self-defence," it was a matter next to an impossibility for one of the contestants to administer, "above the belt" of the other, any serious physical punishment—fighting, as they did, with five-ounce gloves. That a nose was occasionally made to bleed, that now and then a lip was left in a swollen condition, or the face somewhat bruised and disfigured, does not alter the case, as like occurrences are apt to take place in boxing, fencing or in foot-ball.

As the State of Louisiana is in court seeking the forfeiture of the defendant's charter on the ground that the corporation has committed acts *ultra vires* of its charter, and is met with the provisions of an act of her own Legislature which in terms authorizes just such contests as the witnesses describe the Olympic contests to have been, this Court must be excused for declining to disturb the finding of the jury on the facts in favor of the defendant.

If, indeed, such contests are violative of good morals and a sound public policy, the matter comes plainly within the prerogative of the legislative department of the government, which alone can be looked to for relief.

As the suit is *sui generis*, the decision of which depends upon the interpretation of a special statute of this State, authorities and decisions of the courts of other States and countries would be examined in vain; for the question is one of fact.

Judgment affirmed.

Mr. Justice Miller takes no part in this opinion, not being a member of the Court at the time the cause was argued and submitted.

CONCURRING AND DISSENTING OPINION.

NICHOLLS, C. J. The acts prohibited and made criminal by Act No. 25 of 1890 are prize fights, not as defined by professional pugilists, but as commonly known and understood. This appears by the very wording of the statute. Fights which would be prize fights in the popular acceptance of those words, should they take place outside of a club, do not cease to be such, nor are they saved from criminality because they take place within the enclosures of an incorporated club, and held under its auspices. This will scarcely be

State vs. Olympic Club.

denied. Any construction of the statute, or any portion of the statute, which would lead up to and carry with it, as the result of the construction, that prize fights *as commonly known* are any less prohibited inside than they are outside of a club, is in my opinion wrong, would convert a *prohibitory* preventive statute actually into a *permissive* one, and defeat the object and purpose of the law, not only as ascertained from its language but as actually intended by those who took part in and were responsible for its enactment. Glove contests are referred to and permitted in the proviso of the statute, but whatever may be the technical meaning of those words and the technical character of those contests, those which are referred to in this statute, are necessarily those of such character, and *entered into under such circumstances*, as to keep the fighting all the time outside of prize fighting as understood by the people at large. If the glove contests, such as they were in this club, would have brought the contestants within the grasp of the statute had they taken place outside of the club, the same contests inside a club will not protect them—the mere place of exhibition and the patronage of a club does not legally save the situation. It is the popular idea of prize fighting and the common meaning of those words, and not the ideas of professional sportsmen, which are to control Courts in dealing with criminality in this matter. We are not dealing with prize fighting and glove contests technically, but from the standpoint from which the law directs us to view them; prize fights from the standpoint of what are *so considered by the people at large*, and glove contests as necessarily *subordinated to prize fights as so viewed*. I am of the opinion that testimony as to what constitutes prize fighting and what glove contests, in a *technical* sense, was irrelevant to the issue before the Court—that it should have been excluded, but that having been admitted it should carry no weight. I am of the opinion that the contests which have been permitted to take place in the Olympic, fall under the prohibitory terms of the law, and that their further continuance should be checked by injunction. I do not think the charter of the club should be forfeited. I concur in part with, and dissent in part from, the decision rendered.

ON APPLICATION FOR REHEARING.

WATKINS, J. On a re-examination of this case, we have reached the conclusion that expert testimony was improperly admitted at the

Succession of Hernandez.

trial, which may have influenced the verdict of the jury, and that the interests of all parties will be best subserved by remanding the cause with instructions to the judge *a quo* to disallow such evidence.

But, as we are satisfied that, in no event, should the charter of the defendant be forfeited, so much of the decree as appertains thereto will remain undisturbed; our decree being in all other respects reversed and the cause remanded for a new trial.

It is therefore ordered and decreed that our former decree be annulled, except as to the forfeiture of the defendants' charter, which is left in full force; and it is further ordered and decreed that the remaining issues in the cause be remanded to the lower court for a new trial, according to law, and the views herein expressed. The defendant and appellee to pay the costs of appeal, those of the lower court to await final trial therein.

Rehearing refused.

No. 11,420.

SUCCESSION OF JOSEPH HERNANDEZ.

1. The prohibition of Art. 161 of the Code, to the effect that, in case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, is directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded.
2. The prohibition of the statute of New York, to the effect that no second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extra-territorial effect, being a penal statute; and it can not be given the effect of annulling a contract of marriage between persons at the time residing abroad, notwithstanding it was solemnized in the city and State of New York—the contracting parties announcing their intention to be, to thereafter reside in Louisiana, and afterward actually residing there.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

H. P. Dart Attorney for Plaintiff Widow and Appellee:

Joseph Hernandez died testate April 17, 1893. He left a widow by second marriage, Augusta L. Hernandez, three children, majors, and the minor children of a deceased child, all issue of his first marriage. He had been divorced from his first wife by

46	962
106	503
46	962
119	712

Succession of Hernandez.

a decree of the District Court of St. Bernard rendered in October, 1881.

He had made bequests to the wife by second marriage. Upon her demand for payment of legacy the heirs refused, alleging the second marriage, which had been solemnized in the city of New York, was a nullity under Art. 161, C. C.

A judgment in a proceeding for divorce, dismissing the petition and rejecting the demand is *res judicata* between husband and wife as to all the facts therein alleged. The heirs of either are bound by this estoppel in any subsequent proceeding, where the facts involved in this divorce case are again called in question. 5 Am. and Eng. Ency. of Law, 838 (text); *Id.* 847; *Lewis vs. Lewis*, 106 Mass. 309; 2 Wharton, Evidence, p. 690, Sec. 758; Herman, Estoppel, p. 639, Secs. 529, 587; Vanfleet, Collateral Attack, Sec. 17, p. 29; Black on Judgments, Secs. 503 and 506; Freeman on Judgments, Secs. 249, 283; Laurent, Vol. 20, p. 7; p. 122, No. 94; *Jeter vs. Hewitt*, 2 How. 352; Bigelow, Estoppel (2d Ed.), p. 45; Succession of Caballero, 24 An. 578; *Delabigarre's Case*, 3 An. 236; Pothier, Oblig., p. 4, Ch. 3, Sec. 3, Art. V; *Gardner vs. Montague*, 16 An. 300; *Campbell vs. Woolfolk*, 37 An. 323.

A proceeding in divorce is strictly and truly a proceeding *in rem*; Black on Judgments, Secs. 803, 925; Wells, *Res Adjudicata*, Sec. 2, pp. 504, 525, Sec. 577; Greenleaf, Ev., 15 Ed., Sec. 525, p. 662; Herman, Estoppel, Secs. 290, 292, 405.

And a judgment *in rem* is conclusive on the world. Black on Judgment, p. 795; *Caballero Case*, 24 An. 573.

The law of the place where the ceremony is performed governs only as to the form. The status of the parties and the legal effect of the ceremony, are regulated by the law of the domicile. Wharton, Conflict of Laws, Sec. 118, p. 177; see also Secs. 165 and 104; Story, Conflict of Laws, note to p. 217; 3 M. 60; 2 N. S. 576; 9 R. 224; 2 An. 774; 4 An. 67; 10 An. 448, 566; *Kinnier vs. Kinnier*, 45 N. Y. 535, s. c.; 6 Amer. Rep. 132; see also 19 L. 216; 2 N. S. 98; 5 N. S. 587; Portalis, Code Civile Annoté—Gilbert, Vol. 1, p. 156; C. N. 170; Foelix, Droit Internal, Privie, Vol. 1, 180, Sec. 88; *Brook vs. Brook*, 9 House of Lords Cases 192, 193.

A marriage contracted in good faith produces its civil effect. C. C. 117, 118; 39 An. 1021; 1 An. 98; 41 An. 217.

Succession of Hernandez.

Henry Denis on the same side:

Article 161 of our Civil Code prohibits marriage only between the spouse guilty of adultery and his accomplice, when decreed as such in a divorce suit, and on account of whose adultery the judgment of divorce is rendered. *Locré*, Vol. 5, p. 311, Sec. 38; *Laurent*, Vol. 2, p. 478; *Demolombe*, Vol. 3, pp. 165-167; *Marcadé*, Vol. 1, p. 599; *Merlin Rep.*, Vol. 10, p. 216, *verbo* *Empêchement de Marriage*; *Bishop*, Mar. and Div., Vol. 1, Sec. 706. Penal statutes having no extra-territorial effect, a marriage, prohibited in Louisiana, is valid if contracted in New York, where the same prohibition does not exist, and the Courts of Louisiana will recognize the validity of such a marriage. *Endlich* on Statutes, Sec. 169; *Wharton*, Conflict of Laws, Sec. 165; *Story*, Conflict of Laws, Secs. 104, 621; *Bishop*, Mar. and Div., Vol. 1, Secs. 867, 869, and Vol. 2, Secs. 1618, 1619; *Van Voorhis et al.* vs. *Brintnall et al.*, 86 N. Y. 27; *Thorp vs. Thorp*, 90 N. Y. 605; *Moore vs. Hegeman*, 92 N. Y. 523.

Frank N. Butler Attorney for Valentine Hernandez, Defendant and Appellant:

One divorced on the ground of adultery can never, under the laws of the State of New York, contract matrimony with any one, unless such right is reserved to him or to her in the judgment of divorce; and only then after six years have elapsed, and the conduct of the divorcee in the interval has been exemplary. *Revised Statutes of New York*, Vol. 2, p. 1401, pars. 5, 6; *Cropsey vs. Ogden*, 11 New York, 233; *People vs. Fabre*, 98 New York, 146.

In case of divorce on account of adultery under the laws of this State, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage. *Civil Code of Louisiana*, Art 161; *Dupre vs. Boulard*, *f. w. c.*, 10 An. 411; *Succession of Minvielle*, 15 An. 342; *Summerlin vs. Livingston*, 15 An. 520; *Succession of Caballero*, 24 An. 573; *Succession of Colwell*, 34 An. 266; *Succession of Taylor*, 39 An. 829.

Legacies in favor of a woman with whom a married man has been living in adultery, are reprobated and prohibited by law, and are

 Succession of Hernandez.

absolute nullities. Civil Code, Arts. 1481, 1483, 1488; *Cole vs. Lucas*, 2 An. 946; *McCarthy vs. Mandeville*, 3 An. 239; *Hoggatts vs. Gibbs*, 15 An. 702; *Monot vs. Parker*, 30 An. 587; *Dooly vs. Gibson*, 32 An. 961.

No community of acquets and gains exists between parties whose marriage is absolutely null *Domec vs. Barjac et als.* 15 An. 342; *Summerlin vs. Livingston*, 15 An. 519; *Succession of Taylor*, 39 An. 823.

To establish the charge of adultery it is not necessary to prove the direct fact of adultery, but only circumstances that lead to it, by fair inference, as a necessary conclusion. *Greenleaf on Evidence*, Vol. 2, Part 4; "*Adultery*," p. 39; *Bishop on Marriage and Divorce*, 3d Ed., Sec. 422; *Merle vs. Lapeyrolle*, 16 An. 4.

- (a) Testimony and evidence must be specially objected to at the time the testimony is taken and when the evidence is offered to be filed, otherwise no exception to the effect and admissibility of such testimony or evidence can be considered.
- (b) If objection is made to the testimony at the time it is taken and to the evidence when it is offered, and such objections are overruled; no exception or objection to such testimony, or evidence can be considered or examined on appeal, unless the same are regularly presented by the bill of exceptions, or other legal or equivalent mode, showing that the said objections were reserved on the trial at the time the same were made and overruled in the inferior court.
- (c) The court can not supply objections a party has neglected to make. *Hennen's Digest*, Vol. 1, p. 493, pars. 3, 8; 10 *Martin* 429; 6 N. S. 86; 1 La. 301; 6 La. 677; 9 Rob. 464; 11 Rob. 346, 3 An. 290; 5 An. 15; 6 An. 316; 10 An. 491, 636, 713, 767; 12 An. 741; *Louque's Digest*, p. 233; V. (a) 2, 3, (6) 4; *Heiss vs. Corcoran*, 15 An. 694; *Draper vs. Richards*, 20 An. 306; 15 An. 389; 16 An. 285; 20 An. 96, 138; *Mitchell vs. D'Armand*, 30 An. 397; *State vs. Holmes*, 40 An. 170.

RES ADJUDICATA.—"The authority of the thing adjudged takes place only with respect to what was the object of the judgment—the thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality." Civil Code, Art. 2286 (2265). The

Succession of Hernandez.

plea can never be sustained, unless all of the above essentials exist. Herman on Estoppel, p. 24.

ESTOPPEL.—Where a marriage is an absolute nullity, because contracted in contravention of the policy of the State, and is of such a character that it is not susceptible of confirmation or of ratification, no estoppel can be effectually pleaded against any one having an interest to show its nullity and to have the same judicially declared. Summerlin vs. Livingston, 15 An. 519; McCaffrey vs. Benson, 38 An. 202.

Gilmore & Baldwin for Minors, Appellants:

The marriage of a man divorced for adultery with any woman who has been his accomplice in adultery during the marriage is, under the law of Louisiana, null and void. Art. 161, C. C.; Justinian, 134th Novel, Chapter 12; Art. 298, C. N.; Locré, Vol. 5, pp. 161, 198, 255; Act of 1827; Pandects Francaises, Vol. 3, p. 768, Sec. 389.

The marriage in New York of a man divorced for adultery in Louisiana, during the lifetime of his former wife, is null and void. Smith vs. Woodworth, 44 Barbour, N. Y. Supreme Court Rep., p. 200; Van Voorhis vs. Brintnall, 86 N. Y., p. 18; Moore vs. Hegeman, 92 N. Y. 527-528.

In the interpretation of statutes of other countries and States our courts accept the construction placed upon such statutes by the courts of the country or State in which they are passed. Elmen-dorf vs. Taylor, 10 Wheaton, p. 152; Cucullu vs. Insurance Co., 5 N. S., 464.

The general rule of Louisiana law is that the validity *vel non* of the contract of marriage will be determined by the law of the place where it is celebrated. If, however, there is a statute in Louisiana incapacitating certain persons domiciled here from contracting marriage, their marriage abroad, in evasion of this statute, is null and void. Bishop on Marriage, Divorce and Separation, Vol. 1, p. 399, Sec. 920; Dupré vs. Brulard, 10 An. 411; Robin vs. LeBlanc, 12 An. 367; Maillefer vs. Taillot, 4 An. 375; Saul vs. His Creditors, 5 N. S., 569; Succession of Caballero, 24 An. 573; Parsons on Contracts, note on p. 724, Sec. 575, sixth edition (commenting on Saul vs. His Creditors).

Succession of Hernandez.

In order that ignorance of the law should constitute the basis of the good faith necessary to establish a putative marriage, it must be actual and excusable, and the party pleading it must show that all the means that law and prudence require to learn the law have been made use of. Succession of Buissiere, 41 An. 217; Toullier Devergier, Vol. 1, pp. 377-378.

In order that a judgment may be pleaded as *res adjudicata*, it must be shown by the record of the suit in which the judgment was rendered:

That the thing demanded is the same.

The parties must be the same.

There must have been a final judgment.

At common law it is for the plaintiff to non-suit himself, in order to prevent a judgment of dismissal from forming *res adjudicata* against him. Under our law the court can non-suit the plaintiff for insufficient proof of his allegations. Bledso vs. Irwin, 33 An. 619.

A general denial can not form the basis of a plea of estoppel by judicial admission. Arts. 2290 and 2291, Rev. C. C.; Wells & Co. vs. St. Dizier, 9 An. 120; Cummen vs. Cavenah, 1 N. S. 534.

The law does not seem to contemplate that a party's judicial declaration shall be pleaded against him by strangers to the record; certainly not, when these admissions have not led the pleaders astray or damaged them. Poultney's Heirs vs. Cecil's Ex'r, 8 La. 423; Watkins vs. Hawthorn, 33 An. 1198; Heiss vs. Cronan, 12 An. 218; Succession of Harris, 39 An. 145; Stockmeyer vs. Oerterling, 38 An. 102; Morgan vs. Kinnard, 23 An. 647.

Albert Voorhies for the same Heirs and Chas. Hernandez, Appellant:

Two distinct suits which have not been cumulated, more especially when a party to one is not a party to the other, require distinct and separate judgments.

Pending administration of the succession, which, as to minors, is necessarily accepted with benefit of inventory, the minor heirs of the deceased can not be condemned to pay any legacy.

Legatees must proceed against the executors for the payment of their legacies; they can not disregard pending administration, and proceed against heirs of age and minors, and anticipate the

Succession of Hernandez.

payment of creditors. That is especially true when the legatee is one of the executors.

The judgment rendered in the two suits pending covers matters which are not embraced in the issues; it is *ultra petitum*.

The contract of marriage is a matter of *status*; it is not an act passed in one country to have effect in another country. It is the *status* the world over, at the place where celebrated, as well as any and all other States and countries.

The record and judgment of divorce offered in evidence in suit of nullity of such marriage is admissible in evidence only to prove *rem ipsam*—that is, that such a judgment of divorce was rendered; and the complainant must, as regards the adulterous accomplice, prove *aliunde* the fact of adultery and of complicity.

If the pleadings in the divorce suit omit entirely to name the female, with whom adultery is charged, and no exception is taken, but the trial proceeds nevertheless, and culminates in a judgment of divorce, the prohibition against such female to marry the guilty spouse is nevertheless operative; the offence is not condoned.

The prohibition being one of public order, the second marriage is an absolute nullity beyond ratification. Neither party is estopped from invoking such nullity, whether by direct action, or by exception or defence. Neither party can pretend to derive from it any of the consequences of lawful marriage.

The judgments in the two divorce suits, between Joseph Hernandez and his first wife, can not be set up as *res judicata* against the subsequent suit to declare the nullity of the marriage with his second wife, based on the charge of adulterous complicity, because the parties are not the same, nor are the object, the demand and cause of action the same.

Appellants have proven *aliunde* the allegation of adulterous complicity.

E. D. LeBreton and Henry Chiappella Attorneys for Walter Hernandez, Appellant:

R. C. C. 161 (Act of 1827 and Act of 1855); Succession of Taylor, 39 An. 829; Code Napoleon, Art. 298; Proudhon, *Etat des Personnes*, 1 Vol., p. 407 and note; Dalloz, *Dictionnaire Général de Jurisprudence*, 2 Vol., p. 108, Nos. 84, 111; 12 Frim. An. 14, Bruxelles, Boot. D. A. 11, 936, No. 3; Deleurie, *Droit Civile*, 2

Succession of Hernandez.

Vol., p. 66; R. O. C. 3556; R. O. C. 11; R. O. C. 2399, 2400, 2401, 2402; *Bachino vs. Coste*, 35 An. 571; R. O. C. 2239 (amended by Act 5 of 1884, p. 12); R. O. C. 2405; Cross on Pleadings, Sec. 184; R. O. C. 2291; C. P. 357; R. O. C. 1481.

Same Counsel on Application for a Rehearing:

That the prohibition of Art. 161 of the Civil Code is directed against marriage between the guilty spouse and any accomplice in adultery.

The Court hold that the prohibition of said article is only "directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded."

There are no such limitations in the law, and in the absence of any such restrictions in the act itself they may not be supplied by the Court.

As there is not another decision in the whole body of our jurisprudence to which any one can point and say that the Supreme Court of Louisiana has heretofore held that the prohibition of Art. 161 of the Civil Code is directed only against "the accomplice named in the pleadings or in the evidence adduced on the trial of the suit in which the divorce was granted, we submit, with the utmost respect, that your Honors are without law or precedent to warrant you in interpreting Art. 161 as you have done in this cause.

The decree affirming the judgment of the District Court is far more reaching than the opinion, for the simple reason that the judge *a quo* decided a great many more issues, which are not considered in the opinion—rendered judgment against an heir (Charles Hernandez) not a party to the direct action of some of the heirs against Widow Hernandez; condemned the four minor grandchildren of Joseph Hernandez to accept his succession unconditionally, and to pay each of them individually his virile share of the legacy to the executrix; and, proceeding *ultra petitum*, went on to liquidate the succession of the deceased.

This as a matter of course this Court did not contemplate; for had these propositions been considered, your Honors, in strict logi-

Succession of Hernandez.

cal sequence under the views expressed in the opinion, would, after settling the *status* of the parties and recognizing Mrs. Hernandez as widow in community, have reversed the judgment in other respects, remitting the parties to a thorough administration and settlement of the succession in due course, in accordance with the views expressed in the opinion.

So much relief could be granted without a rehearing. Your Honors might simply amend the decree for that purpose.

The opinion of the court was delivered by

WATKINS, J. Originally this suit had, for its object, recovery by Augusta L. Church, the alleged surviving widow of the deceased, the money and movable effects of which she was donee by the testamentary bequest; but the legal heirs of the deceased by a former marriage incorporated a reconventional demand and other issues in their answer; the same were made the subject of a subsequent direct attack on the claims and pretensions of the plaintiff, which she, in turn, put at issue by answer.

On these pleadings and issues there was a general judgment against the heirs, and in favor of the original plaintiff and donee; the heirs have appealed.

I.

The will of the deceased is of the following tenor, viz.:

“NEW ORLEANS, December 27, 1890.

“This is my olographic will—I give and bequeath to my wife Augusta L. Church, all the movable effects contained in our house, corner Bordeaux and St. Charles avenue, with the exception of the family paintings, which I give to my son Charles—he to divide them with his brother and sister. I also give and bequeath to my wife the sum of ten thousand dollars. The balance of my estate I bequeath to my children, share and share alike.

“I appoint as my executors my wife and my son Charles, they to have full charge of my estate without giving any bonds.

(Signed) “J. HERNANDEZ.”

The grounds on which the heirs attack the testamentary bequest in favor of the plaintiff are best stated in the language of their answer and reconventional demand, and in that of their petition, attacking plaintiff's capacity to receive by will, and the legality of her

Succession of Hernandez.

title to a community half interest in the property left at the demise of the decedent.

The following is an extract from their answer, viz.:

"That a final judgment was rendered and signed on the 4th of October, 1881, or about that time, in the suit entitled Joseph Hernandez vs. Rosema D'Aunoy, his wife, No 70 of the docket of the Twenty-fourth Judicial District Court for the parish of St. Bernard, in favor of the defendant in said suit; and, on her demand in reconvention therein against the said plaintiff, Joseph Hernandez, decreeing a separation from bed and board, and a final divorce *a vinculo matrimonii*, dissolving forever the bonds of matrimony existing between them; shown by a duly certified copy of said judgment, herewith filed and made a part of this answer, marked Exhibit A.

"That the aforesaid judgment was rendered and the divorce therein granted allowed in favor of the said Rosema D'Aunoy, wife of said Joseph Hernandez, and against her said husband, on the ground of *adultery*.

"That the petitioner herein, now styling herself as Mistress Augusta Lodoiska Church, widow in community of Joseph Hernandez, deceased, but in times past styling herself as Mistress Ogden and as Mistress Ida Curtis, *was the chief accomplice in adultery with the said Joseph Hernandez*, and, at various times and places anterior to the rendition of the aforesaid judgment of divorce, had illicit sexual intercourse with the said Joseph Hernandez, viz., in 1879, 1880 and 1881, and in other years prior thereto, in the city of New York, at the St. James Hotel and elsewhere, and in the city of New Orleans, at the St. Charles Hotel and elsewhere, time and time again. *That owing to the said judgment of divorce, granted as aforesaid, in favor of Mistress Rosema D'Aunoy, wife of said Joseph Hernandez, against her said husband, and on account of said petitioner's complicity in adultery with said Joseph Hernandez, the said petitioner and the said Joseph Hernandez became forever legally incapable of contracting marriage with each other, and the so-called marriage, relied on by petitioner, if ever contracted, which is herein specially denied, was, is, always has been and always will be absolutely null and void and without any lawful force or effect.*

"Further answering, these respondents say—that no community of acquets and gains ever existed between the said petitioner and the said Joseph Hernandez; that said petitioner never had any right,

Succession of Hernandez.

title, interest or claim in or to any of the property, real, personal or mixed, appertaining or belonging to the estate of the late Joseph Hernandez; that the so-called legacy of ten thousand dollars, and the so-called legacy of the movable effects in the residence of the said Joseph Hernandez, at the corner of St. Charles avenue and Bordeaux street, in this city, claimed by petitioner in her aforesaid petition, were and are unlawful and without any force or effect, and should be so decreed and held by the judgment of this Honorable Court.

“Respondents further answering show that immediately after the aforesaid judgment of divorce was rendered and executed, the said Joseph Hernandez had held and owned not less than two hundred thousand dollars (\$200,000) real and personal property; and at the date of his death in April, 1893, all that could then be found, and all that has since been discovered of his entire estate, will not equal in value the sum of one hundred thousand dollars (\$100,000).

“That from 1881 to April, 1893, the said Joseph Hernandez was living openly with the said petitioner, Mistress Augusta Lodoiska Church, as man and wife, notwithstanding the prohibition aforesaid, which inhibited them from living in that way and from ever contracting the marriage relationship.

“That during the period aforesaid—that is since 1881—a large portion of the estate of the said Joseph Hernandez has been illegally wasted and lavished upon the aforesaid petitioner, owing to her unlawful and undue influence over the said deceased, and the diminution of said estate has been largely occasioned by petitioner’s extravagant living, and by the many large and unlawful gifts and presents and transfers, which the said petitioner illegally obtained from the said Joseph Hernandez; that the so-called legacy of ten thousand dollars (\$10,000), and the so-called legacy of the movables in the residence of the said deceased, claimed as aforesaid by petitioner, *composes more than one-third of the entire estate* of said Joseph Hernandez so far discovered; *that by law the said testator could not under any circumstances have lawfully given the said petitioner more than one-tenth part of the movables of his estate*—which portion, and more, the said deceased had long before disposed of in favor of petitioner by gift, donation and otherwise.

“And these respondents further answering say—that for the foregoing and other reasons the said petitioner is not entitled to said so-

Succession of Hernandez.

called legacies, or either of them, nor can she have possession or delivery of the same, as claimed in her petition or otherwise; that the gifts, transfers and donations made by the said Joseph Hernandez to petitioner, at various times, exceeded fifty thousand dollars, and more than exhausted his ability and power to give or bequeath anything to petitioner by his last will and testament. That all the provisions of said last will containing bequests in favor of petitioner should therefore be canceled and decreed and held illegal, null and void.

"And now reconvening and becoming plaintiffs in reconvention respondents pray for judgment on the original demand herein—in their favor and against petitioner; and upon the demand in reconvention, appearers pray for judgment in their favor and against the said Mistress Augusta Lodoiska Church, illegally styling herself widow in community of the late Joseph Hernandez, for fifty thousand dollars (\$50,000), or for so much thereof as will be shown on the trial of this cause to have been illegally given, transferred or disposed of in favor of said petitioner by said Joseph Hernandez; and that all such unlawful gifts and transfers may be annulled—and reconvenor further prays for a judgment decreeing the alleged marriage between petitioner and the said Joseph Hernandez to be, and to have always been an absolute nullity, and without any legal force or effect."

Several months subsequent to the filing of this answer the heirs filed a petition making a direct demand for the annulment of the legacy on the same averments of illegality of the marriage of the plaintiff with their father, and praying for a personal judgment against her for the sum of fifty thousand dollars, approximately.

As the language of this petition is somewhat more comprehensive than the answer of the heirs, and the charges against the plaintiff are somewhat more elaborated and intensified, we will reproduce the following extracts:

"Petitioners further show that the said judgment granting a divorce in favor of said Rosema D'Aunoy against her said husband, Joseph Hernandez, on the ground of his adultery and the complicity of the defendant herein in adultery with the said Joseph Hernandez, as aforesaid, constituted a fixed, absolute and perpetual barrier to any marriage between the said Joseph Hernandez and the defendant herein."

Succession of Hernandez.

“That if any marriage was ever contracted between the said Joseph Hernandez and the defendant herein, which petitioners specially deny, said so-called marriage was entered into in bad faith on the part of said defendant, and in violation of prohibitory laws, and was, is, always has been, and ever will be, absolutely null and void.

“Petitioners further show that as there never was any legal marriage between the late Joseph Hernandez and the defendant herein, there was not, and never could have been, any community of acquets and gains between them, and said defendant has not and never has had, any community rights nor claims, whatsoever, in or to any of the assets or properties, real, personal or mixed, appertaining or belonging to the estate of the late Joseph Hernandez.”

In order to be explicit, we reproduce the prayer of the defendant's petition:

“Wherefore, petitioners pray that Mistress Augusta Lodoiska Church, illegally claiming to be the widow in community of the late Joseph Hernandez, be cited to appear and answer this petition; and after due proceedings had, judgment be rendered in favor of petitioners, and against said defendant, *decreeing said defendant never to have been the wife, nor the widow in community, or otherwise, of the late Joseph Hernandez—furthermore, annulling all bequests contained in the last will and testament of the late Joseph Hernandez, in favor of the said defendant, and ordering the entire estate of the late Joseph Hernandez to be distributed among his forced heirs, as their interests may appear, regardless of any bequests contained in said will in favor of said defendant. Furthermore, decreeing that all the movables and other properties inventoried in this estate be held and adjudged to have belonged exclusively to the said Joseph Hernandez and to his aforesaid surviving forced heirs, and condemning the said defendant to pay back to this estate fifty thousand dollars (\$50,000), or so much thereof as will be shown on the trial of this cause, to have been illegally given, transferred or disposed of by said Joseph Hernandez, to or in favor of said defendant, and that all such unlawful donations, gifts and transfers be annulled.*

“And if it be shown that the contract of marriage was ever solemnized between defendant and said Joseph Hernandez, then, and in that event, that judgment be rendered herein decreeing said mar-

Succession of Hernandez.

riage to have been always an absolute nullity, and without legal force or effect."

In answer to these charges, the original plaintiff—the alleged surviving widow of Hernandez—"averts that she was legally married to the late Joseph Hernandez on the 29th of December, 1881, in the city of New York, by the mayor of said city, and under the laws of that State; and that no impediment of any kind existed against said marriage, either at the time of its celebration or before.

"That the charges preferred, of complicity in adultery with the said Joseph Hernandez, are false and untrue, and no judgment to that effect was ever rendered, nor was respondent party to any proceeding in which said issue was asserted or maintained.

"That the petitioners have ever since her marriage acknowledged the validity of the same, visited the common domicile daily, and have recognized respondent as the lawful wife of said Hernandez, and they are now estopped from denying the validity of said marriage.

"That respondent owned in her own name when she married the said Joseph Hernandez, property amounting to not less than twenty-five thousand dollars, consisting of money, jewelry, paintings, carriages, furniture, table and bed linen and household effects.

"That petitioners are estopped from denying the truth and reality of the acts of purchase by respondent of the two pieces of immovable property situated in the parish of St. Tammany in this State, in which acts of purchase the said Joseph Hernandez acknowledged and declared that the price was paid with the paraphernal funds of your respondent.

"Wherefore, respondent prays that plaintiff's demand be dismissed, with costs, and that there be judgment in favor of respondent, decreeing that she was lawfully married to Joseph Hernandez; that the legacy he made her in his last will is valid and legal and be paid to her; that she be recognized as entitled to half of the community property left by him, and that her paraphernal rights be recognized and decreed for such amount and specific effects and things as she may prove herself entitled to on the trial of this cause."

These extended extracts from the pleadings best serve to characterize the controversies in this case and fix the mind of the Court on the questions that are to be solved by testimony—much of which is received over objection.

II.

The foundation of the attack of the Hernandez heirs upon claims of the alleged surviving widow depend, primarily and mainly, upon a proper construction of Art. 161 of the Revised Civil Code, the text of which is as follows, viz.:

"In case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy; and under penalty of nullity of the new marriage."

The contention of the heirs is that the denunciation of that article against the marriage of the guilty party with his or her accomplice in adultery is matter *en pais* to be determined by the administration of proof on the trial of a suit that involves the validity of the marriage; while that of the plaintiff is, that it is against the marriage of the guilty party named in the divorce suit as an accomplice, or *particeps criminis* in the adultery charged as the cause of the action, whether such accomplice be made a co-respondent or not.

Hence, upon the determination of the correctness of these contentions *pro et con*, depends the admissibility of the large volume of evidence found in the record; and upon the construction of the cited article of the Code mainly depends the legality of the marriage of Joseph Hernandez with plaintiff on the 29th of November, 1881.

The proofs principally relied upon by plaintiff are the following, to-wit:

1. The last will of the late Joseph Hernandez.
2. The certificate of marriage, issued from the office of the mayor of New York, certifying that the ceremony between Mr. Joseph Hernandez and Mrs. Augusta L. Ogden, of Paris, France, was performed by the mayor of New York, on the 29th of December, 1881, at his office in said city.
3. Volume 3 of the Revised Statutes of New York, seventh edition, title 1, Art. 1, paragraph 8, at p. 2332, for the purpose of showing the mayor's authority to celebrate a marriage.
4. Her testimony to the effect that the Augusta L. Ogden, named in said marriage certificate, was the same person as herself.

"The fundamental facts on which the forced heirs of the late Joseph Hernandez rely to overthrow the demands of Mrs. A. L. Church for a delivery of her aforesaid legacy, and on which they

Succession of Hernandez.

have sought and are still endeavoring to annul the same, and to have her aforesaid marriage decreed to be without any legal force or effect, are:

"1. The divorce granted Mrs. Rosema D'Aunoy, wife of Joseph Hernandez, by the District Court of the parish of St. Bernard, on the 4th of October, 1881, on the ground of adultery, and

"2. Complicity in adultery on the part of Augusta L. Church with said Joseph Hernandez, during his marriage with Rosema D'Aunoy." Defendant's brief, pp. 21, 22."

In support of the foregoing charges, defendants made the following proofs, viz.:

First: The record, and pertinent facts therewith connected, in the suit entitled Joseph Hernandez vs. His Wife, No. 70 on the docket of the Twenty-fourth Judicial District Court, parish of St. Bernard.

(a) The aforesaid suit was directed against Rosema D'Aunoy as the wife of plaintiff, claiming a divorce *a vinculo matrimonii* on various grounds which it is needless to mention. The record of this suit was lost or destroyed by the fire which burnt the court house on the 2d of March, 1884, as is stated in the certificate of the clerk, appended to the copy of the minutes of the court—same alone surviving the fire.

(b) The testimony of the presiding judge and the lawyers engaged in the trial of the case was taken with the view of establishing the purport of the pleadings, evidence, and judgment pronounced therein.

The judge states his recollections to be that the defendant charged adultery on the part of her husband and asked judgment of divorce accordingly.

That several witnesses were examined, and that the charge of adultery on the part of the husband was fully established, but with what particular person he can not remember. But he further amplifies his statement, thus:

"I have stated all I remember of this case in the above answer. I can not state whether the pleadings set forth the name of the person or persons with whom Hernandez was charged with having committed adultery. My impression is that the evidence established that he visited houses of assignation, and committed adultery with prostitutes."

The statement of the attorney who brought that suit is, that no

Succession of Hernadeuz.

one was named as co-respondent, and no one was named or specified as the person or persons with whom the plaintiff had committed adultery, on the faith of which the defendant's reconventional demand was made. That his recollection is that the evidence was not reduced to writing. He remembers that one witness stated, substantially, that he knew of two instances wherein Mr. Hernandez had committed adultery. He states positively that "no witness specified any particular person with whom Mr. Hernandez had committed adultery; and no one stated that he had committed adultery with one Mistress Augusta L. Church, sometimes called Augusta Ogden, and sometimes called Augusta L. Curtis. To the best of his recollection, the name of Mistress Church, Mistress Ogden, or Mistress Curtis was not mentioned on the trial." That "he remembers no evidence introduced on the trial of the cause for divorce tending to show that Mr. Hernandez was guilty of adultery with his second wife, Mrs. A. L. Hernandez; nor anything in the judgment of divorce fixing the guilt of adultery upon the said Mistress A. L. Church, now the widow of Joseph Hernandez."

The testimony of a prominent lawyer, who was connected with the case, is best evidenced by the following, viz.:

"Q. Were you present in the District Court of St. Bernard parish on the day when the case of Hernandez against his wife for a divorce was tried?

"A. I was.

"Q. Did you see at the time, or previously, the pleadings in that case?

"A. I did.

"Q. Do you remember, at this date, who was the party named as the accomplice or guilty person in the adultery there charged by the wife against the husband?

"A. My memory is that there was no person named. My memory of the suit is that it was a suit by Mr. Hernandez against his wife for a divorce, she reconvening and claiming a divorce from him, on the ground of adultery.

"Q. I believe your memory is correct. You heard the evidence administered in support of the charge of adultery?

"A. I did, sir.

"Q. Do you remember the name of the witness who was examined?

Succession of Hernandez.

"A. Yes; I do, sir.

"Q. What is it?

"A. L. E. Lemarie.

"Q. Did he, or did he not, give any testimony implicating Mrs. Augusta L. Curtis, the present Mrs. Hernandez?

"A. None in the world, sir."

The witness last named was placed upon the stand as a witness in this case, and his statement is in keeping with the testimony of the witness last quoted from.

"Q. Have you no recollection of having mentioned any one, in your testimony that you gave on the trial of that cause?

"A. I don't think I have. I don't think the question was asked me."

One of the attorneys who represented the defendant in the suit was examined as a witness, and produced and filed in evidence, in connection with his evidence, a copy of the defendant's answer and reconventional demand, which is of the following tenor, viz.:

"JOSEPH HERNANDEZ VS. HIS WIFE.

"No. 70. TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF ST. BERNARD.

"The answer of defendant herein denies generally each and every allegation in the plaintiff's petition contained, except the fact of marriage and community of property; and now, assuming the character of plaintiff in reconvention, she avers:

"That her said husband, forgetting alike his vows and marriage with petitioner, did commit adultery with certain females, at various times and places in this city, since the 21st of April, 1880, *the full particulars and specifications whereof have been served in writing upon defendant, and same are made part hereof*, and that, by reason thereof and the law, your petitioner is entitled to a final divorce.

"Wherefore she prays judgment in her favor on the demand of plaintiff, and in her favor on the reconventional demand against her husband, Joseph Hernandez, decreeing a separation from bed and board, and final divorce *a vinculo matrimonii*, forever dissolving the bonds of matrimony now existing between them, that a separation of property be decreed, and that ——— notary public, be appointed to partition the community property, and she prays for all

Succession of Hernandez

such further aid, relief and remedy as the court is competent to give in the premises.

(Signed)

" W. S. BENEDICT and

" E. NORTH CULLOM,

" Attorneys."

The counsel's attention having been attracted to the phrase we have italicized, namely, "the full particulars and specifications whereof having been served in writing upon the defendant and made a part hereof," the following question was propounded and answer given, viz.:

" Q. In the copy of the answer that you have referred to in your testimony as having been filed in the case, mention is made of particulars and specifications served in writing upon the defendant, and made a part of that answer. Have you a copy of those specifications?

" A. There were none filed.

" Q. There were none?

" A. There were none filed with the answer?"

His remembrance of the facts detailed on the trial of that case is much the same as that of other witnesses.

The exceptions filed related exclusively to the jurisdiction of the court, and same were overruled.

Notwithstanding the destruction by fire of the original records the minutes of the court, in that case, were fortunately preserved, and they contain the judgment of the court, regularly signed, and which is of the following tenor, to-wit:

Extract from the minutes of October 4, 1881.

"The court met this day pursuant to adjournment:

"Present: the Hon. A. E. Livaudais, Judge.

"No. 70.

"JOSEPH HERNANDEZ VS. ROSEMA D'AUNOY, WIFE.

"The expert herein appointed, Edgar H. Farrar, this day appeared in open court and presented his report, which was ordered filed, and made a part of the record of this case, and this case being regularly fixed came up for trial on its merits.

"Present, A. G. Brice, attorney for plaintiff, and W. S. Benedict and E. North Cullom, of counsel for defendant.

Succession of Hernandez.

"When after hearing pleadings, evidence and counsel, and the report of the expert herein appointed, the court considering the law and the evidence to be in favor of defendant on the plaintiff's demand, and in favor of the defendant on her reconventional demand and against the plaintiff; it is ordered, adjudged and decreed that there be judgment herein on plaintiff's demand in favor of the defendant Rosema D'Aunoy, and against Joseph Hernandez, plaintiff, with costs, and it is

"Further ordered, adjudged and decreed that on the reconventional demand there be judgment herein in favor of Rosema D'Aunoy, wife of Joseph Hernandez, and against the said Joseph Hernandez, her husband, decreeing a separation from bed and board between the said parties, and a final divorce *a vinculo matrimonii*, forever dissolving the bonds of matrimony existing between them. It is further ordered, adjudged and decreed that the rights of the said Rosema D'Aunoy, wife of Joseph Hernandez, against her husband, Joseph Hernandez, resulting from the community of acquets and gains lately existing between them, be fixed and determined in the sum of fifty-five thousand dollars, and that in accordance therewith there be judgment in favor of Rosema D'Aunoy, wife of Joseph Hernandez, and against her said husband in said sum of fifty-five thousand dollars, with legal interest from date with all costs.

* * * * *

"Judgment rendered and signed in open court, this fourth day of October, 1881.

(Signed)

"A. E. LIVAUDAIS,

"Judge 24th Judicial District Court of Louisiana."

The foregoing *résumé* of the record and evidence in the divorce suit, fully and conclusively demonstrates, that the action was not grounded on any charge of adultery, in which the present plaintiff was alleged or shown to have been a participant, and on the plaintiff's theory of the law she was not an accomplice in the adultery, of which the plaintiff in that case, was proven guilty, the purport of the defendant's charge against her being:

"That, owing to the judgment of divorce, granted as aforesaid in favor of Mrs. Rosema D'Aunoy, wife of said Joseph Hernandez, against her husband, and on account of said petitioner's complicity in adultery with the said Joseph Hernandez, the said petitioner and the said Joseph Hernandez became forever legally incapable of contracting

Succession of Hernandez.

marriage with each other; and the so-called marriage relied on by petitioner, if ever contracted, which is herein specially denied, was, is, always has been, and always will be absolutely null and void, and without any lawful force or effect (Tr., p. 28). (The italics are ours)."

At this stage of the proceedings, the defendants offered evidence *aliunde*, to prove that the plaintiff had committed adultery with Hernandez, at different times and places, for the purpose and with the object of establishing the fact, that, on their theory, she was his accomplice in adultery, in the sense and within the denunciation of the Code.

To this evidence counsel for the defendant objected, on the following grounds, viz.:

"First, that no proof was admissible beyond the scope of the allegations, which claimed the nullity of the marriage exclusively on the ground, that the judgment in the divorce suit of Rosema D'Aunoy had established the adultery of Joseph Hernandez with Augusta L. Church; and

"Secondly, that the prohibition of marriage between the guilty spouse and his accomplice in adultery, as provided for in Art. 161 of the Code, applies only to the accomplice *decreed as such in a divorce suit, and on account of whose adultery with the guilty spouse the judgment of divorce is rendered.*"

An attentive and careful consideration of the pleadings of the defendants, as a whole, does not disclose that the nullity of the marriage, is rested exclusively, on the finding of the court to the effect that Hernandez had been guilty of adultery with the plaintiff; consequently the first rule of exclusion urged is not good, and in this respect the ruling of the judge *a quo* was correct.

But the second ground for the exclusion of the evidence offered is serious, and requires careful consideration.

What is the meaning and significance of the words of the article, "In case of divorce on account of adultery, the guilty party can never contract marriage with his or her accomplice in adultery?"

Does it mean an accomplice in the *particular* adultery of which the guilty party is charged, and on which the suit for divorce is predicated and decided? or does it mean an accomplice in *any* adultery with *any one*, antecedent to the institution of the divorce suit, re-

Succession of Hernandez.

ardless of whether she is the person named or contemplated in the suit or not?

The answer of plaintiff's counsel to the foregoing query is found so well stated in their brief that we extract the most pertinent portion as the best mode of presenting it.

It is as follows:

"We see that it is only *in case of divorce* that a subsequent marriage is prohibited between the guilty spouse and his accomplice. The prohibition does not apply if the first marriage was dissolved by death; the guilty spouse surviving could clearly marry his accomplice in adultery, inasmuch as no law forbids it, and penal statutes can not be extended by implication. We find this well explained in Merlin, Rep. de Jurisp., Vol. 10, p. 216, *verbo* Empêchement de Marriage. He gives there also the origin of this prohibition. It was taken from the Roman law by the Catholic church. The subsequent marriage with the accomplice was only prohibited when the adultery was committed under a promise of marriage.

"But says Merlin: 'The Civil Code is more severe; it provides, Art. 298, that: "In the case of divorce on account of adultery, the guilty spouse can never marry his accomplice." Thus, in order to create the prohibition, it is no more necessary that the promise of marriage should concur with the adultery. But, let us observe it well, *this provision is limited to the case where the adultery has been followed by a divorce*. There could be, therefore, no opposition to the marriage of a widow with a man with whom it would be pretended that she had lived in adultery during her marriage; *such a proof would not be admissible*.' " (The italics are ours)." A comparison with the text of the Art. 298 of the Code Napoleon, proves the correctness of the foregoing quotation. In Locré's commentary on the French Code, title "of divorce," he says: "That the wife, against whom the divorce has been 'pronounced, for this cause'—adultery—is incapable of contracting a new marriage.'" Locré, Vol. 5. p. 161.

"That the husband against whom the divorce has been pronounced, for cause of adultery, will not be incapable of contracting a second marriage, if it is not with his concubine." *Id.*

"The adulterous husband will never be able to marry afterward with his accomplice. He should not be able to find, by and

Succession of Hernandez.

through the judgment which condemns him, a title and instrumentality to satisfy a guilty passion." *Id.* p. 311, Sec. 38.

This author is in full accord with the views of other French commentators, who hold that the reason for the prohibition is that the guilty party should not be allowed to procure a divorce for the purpose of marrying his accomplice; or, in other words, the effect of the judgment releasing him from his marriage covenant ought not to be to furnish him immunity from his crime, by permitting him, afterward, to contract a new marriage with the *particeps criminis* in the adultery of which he has been convicted. Laurent, Vol. 2, p. 478, Sec. 367; Toullier, Vol. 1, p. 465; Duranton, Vol. 2, p. 124, Sec. 177; Demolombe, Vol. 8, pp. 165, 167; Marcadé, Vol. 1, p. 599.

By a comparison it will appear that the language of the Code Napoleon is almost identical with that of our Civil Code.

The Legislature of 1827 incorporated into the body of our law the revisions of the Code Napoleon, in the following phraseology:

"That in cases of divorce on account of adultery, the guilty party can never contract matrimony with his or her accomplice in the adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy and under the penalty of nullity of the new marriage." Act relative to divorces, Sec. 10, p. 130.

This statute was re-enacted in 1855, without any other change or modification than the omission of the word "the," which occurs in the original text just before the word adultery. Act 307 of 1855, Sec. 8.

Counsel for the defendants refer to this omission from the act of 1855—which is identical in terms with Art. 161 of the Code—of the article "the," as significant of legislative purpose on the question, and they employ this language:

"Be that as it may, the fact that when, in 1855, the present Art. 161 of our Code was adopted, the word "the" was omitted, shows beyond all doubt that if our Legislature in 1827 did intend to restrict the bar to marriage between the divorced spouse and his accomplice to any one accomplice, or any one set of accomplices, that it abandoned the policy, and, in its wisdom, made the law conform to the Code Napoleon, except in this, that while the French law is only mandatory, ours renders the marriage null."

The question presented is apparently *res nova* in our jurisprudence

Succession of Hernandez.

—no pertinent decision of this Court, or of the Court of Cassation, having been cited on either side.

True it is, that counsel for defendants have referred to and quoted from several cases, and notably the following, viz.: Dupré vs. Executor of Boulard, 10 An. 411; Succession of Minvielle, 15 An. 342; Summerlin vs. Livingston, 15 An. 520; Caballero's Succession, 24 An. 573; Succession of Colwell, 34 An. 266. But all of those cases treat of the nullity of marriages between white and colored persons, which was prohibited by the terms of Art. 95 of the Code of 1825, which was expunged from the Revised Code of 1870, and, for the first time embodied the present Art. 161.

Therefore, those cases bear no analogy to the question under consideration.

But the Succession of Taylor, 39 An. 825, points in a direction opposite that of defendant's view.

From the statement of the case it appears that J. C. Taylor married Miss Sarah Castleberry in 1852, and in 1865 they voluntarily separated and thereafter lived apart. In 1866, Mrs. Sarah C. Taylor sued her husband for a divorce on the ground of adultery, but judgment went against her. In December of that year, Taylor and Widow McFarland were married in the State of Arkansas, and thereafter they lived and cohabited together. In 1867, Mrs. S. C. Taylor renewed her suit against Taylor for a divorce, grounding her demand upon the alleged adulterous life he was then leading with his pretended wife, under the Arkansas marriage ceremony, and in the month of November of that year, judgment was rendered in her favor, granting her a full divorce against Taylor.

In the case under consideration, the children of the marriage of Taylor and Widow McFarland sought to obtain a share in their father's estate, and the children of the marriage of Taylor with Miss Castleberry resisted their claims, invoking the nullity of the marriage on the authority of Art. 161, Revised Code.

Of this controversy the Court said:

"We conclude from the record that Mrs. McFarland's conduct in marrying Taylor in Arkansas in December, 1866, was not characterized by good faith in law, and that in cohabiting with him thereafter she became his accomplice in adultery," and therefore their marriage was void.

In that case the wife suing for and obtaining a judgment of divorce

Succession of Hernandez.

alleged that her husband had committed adultery with the identical person with whom he had been living; and the proof on the trial sustained the charge—hence she was, in the sense of Art. 161, his accomplice in the adultery. That case appears to confirm the theory of the plaintiff, though it possesses two features which distinguishes it from the instant case, and they are (1) that Taylor married Mrs. McFarland *before he was divorced from his legal wife*, while Hernandez was not married until after he was divorced from his first wife; and (2) that in the Taylor case the accomplice was named, though in the Hernandez suit she was not.

Independent of the support which that decision brings to the plaintiff's theory, the rule of our jurisprudence is that in a suit for divorce grounded on a charge of adultery, the plaintiff must specially mention the person with whom the adultery has been committed, and full particulars of time and place must be given, so as to put the defendant on his guard, though it is not necessary that such person should be formally cited to answer as a co-respondent.

As an illustration of that rule the following cases may be cited, namely: *Compton vs. Compton*, 9 An. 499; *Souberville vs. Adams*, 46 An. p. 119.

This precept of jurisprudence seems to have been followed in the Taylor case. 39 An. 825.

Not only is this theory in accord with correct rules of judicial procedure and pleading, but they comport with the principles of Art. 161 of the Code, which, manifestly, indicates the necessity of the accomplice being *named* and disclosed, as the means of enforcing its behests.

If this were not so, grave and serious injury might result; and the rights of inheritance, the legitimacy of children, and the security of marital rights, as well as the title to property, would be imperiled by the uncertainty and insecurity of the tenure, depending, as it would, upon the uncertain recollection of witnesses, long years after the occurrence had happened.

Who could be an accomplice of the guilty party other than the person with whom the adultery was committed? To constitute the defendant in a divorce suit a "guilty party," the proof must show that he has committed adultery with some one; for, if the proof does not establish his guilt, the divorce can not be granted. If, indeed, the defendant had been engaged in promiscuous sexual intercourse

Succession of Hernandez.

with sundry persons, and these facts were not disclosed by proof on the trial of the divorce suit, he could not, in respect to such transactions, be considered a guilty party; and, consequently, the persons with whom such undisclosed adulteries had been committed could not possibly be deemed accomplices in the sense of the Code. For to be an accomplice, necessarily presupposes a *principal*, whose guilt has been established, and in whose guilt she is a *particeps criminis*.

On mature reflection, and a careful examination of all the authorities bearing on the question, we have reached the conclusion that the plaintiff's *second* objection was well taken and should have been sustained by the judge *a quo*, and the testimony that is covered by it, rejected and excluded.

The conclusion that necessarily results is, that Hernandez was under no legal disability to enter into a contract of marriage with the plaintiff, resulting as a consequence of the judgment of divorce; albeit, same was grounded on a charge of adultery—that is, if the marriage ceremony had been performed in the State of Louisiana.

We are therefore dispensed from making an examination of the previous divorce proceedings and the judgment of dismissal thereof, and the resulting effect of the estoppel and *res adjudicata* pleaded, as well as parol proof of adultery *vel non* between the plaintiff and Hernandez prior to the institution of the last suit for divorce.

III.

It remains for the court to consider the legal effect of the contract of marriage which the plaintiff entered into with Hernandez in the city and State of New York, and we are to determine whether the contracting parties thereby came under the denunciation of the New York statute, which prohibits the second marriage of persons who have been divorced because of adultery during the lifetime of the former husband or wife.

The following is a literal copy of the New York marriage certificate, viz.:

“STATE OF NEW YORK,
“City and County of New York.

“I, W. R. Grace, Mayor of the City of New York,

“Do hereby certify,

“That on the 29th of December, 1881, at the Mayor's office, I duly performed the *Marriage Ceremony* between Mr. Joseph Hernandez, of New Orleans, La., and Mrs. Augusta L. Ogden, of Paris, France.

Succession of Hernandez.

"That the said parties were satisfactorily made known to me, and were of lawful age to contract marriage, and that upon due inquiry by me made, there appeared no legal impediment to said marriage.

"I further certify that the following persons, C. H. Woodman and C. G. Crocker, were present and became subscribing witnesses to said marriage.

"[Seal affixed] (Signed) W. R. GRACE, Mayor."

The following is the section of the Revised Statutes of New York the prohibition of which the defendants' counsel invoked, viz.:

"Section 5 of the Revised Statutes of New York (Birdseye's Edition), p. 1401, reads as follows:

"'No second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, unless,

"'1. The marriage with such former husband or wife shall have been annulled or dissolved for some cause other than the adultery of such person, or,

"'2. Unless such former husband and wife shall have been finally sentenced to imprisonment for life.

"'Every marriage contracted in violation of the provisions of this section shall, except in the case provided for in the next section, be absolutely void.'"

On this state of facts, defendants' counsel contend that the terms of the New York statute include within its prohibition all persons divorced, whether under the law of Louisiana or that of New York, because of adultery, and *render them incapacitated to enter into a contract of marriage in New York*, notwithstanding they have their residence in Louisiana at the time; on the contrary, the contention of the plaintiff's counsel is to the effect that the law of New York, being a penal statute, can have no extra-territorial effect, and therefore can not annul a contract of marriage between persons residing abroad, though solemnized in that State.

The question for this court to decide is, whether the plaintiff's marriage celebrated in New York was valid, Hernandez having been divorced by a judgment of a Louisiana court because of adultery—his divorced wife still living.

Not only does the marriage certificate show that Hernandez, at the time, resided in Louisiana, and Mrs. Augusta L. Ogden resided in Paris, France, but the testimony shows that immediately after the

Succession of Hernandez.

marriage ceremony the newly married couple came to New Orleans to live, and continuously thereafter resided, here as man and wife.

In the course of the argument of defendants' counsel, they employ this language, viz.:

"In Louisiana, however, while the general rule, that the validity of a marriage is to be determined by the *lex loci contractus*, is recognized, it has been held that where parties go abroad to evade our local statutes prohibiting their marriage the contract is null. Dupré vs. Executors of Boulard, 10 An. 411; Robin vs. LeBlanc, 12 An. 367; Maillefer vs. Saillet, 4 An. 375; Saul vs. His Creditors, 5 N. S. 569; Succession of Caballero, 24 An. 573; Parsons on Contracts, note on page 724, Sec. 575, Sixth Edition (commenting on Saul vs. His Creditors).

"We do not understand the law of Louisiana to limit the general doctrine that the *lex loci* shall govern marriages as to the capacity of the parties in any other way than by declaring that this rule shall not govern its citizens *when they are incapacitated by a local prohibitory law from contracting.*"

That theory may be at once accepted; but it only goes to the extent that the marriage contracted abroad is intended to defeat the prohibition of a local statute. As this case stands now—with the prohibition of Art. 161 of the Code eliminated from the discussion—it is not the case of a marriage contracted abroad for the purpose of defeating the prohibition of a local statute.

In the present attitude of the case, the converse of that proposition is exhibited; and it is whether a marriage in New York of persons fully capacitated to contract marriage in Louisiana, where the marriage domicile is to be established, and where the husband has theretofore resided, will be declared a nullity by a Louisiana court, because a prohibition of a New York statute?

"The law considers marriage in no other view than as a civil contract" (R. C. C. 86, 90); and a general provision of our Code is that "the effect of acts passed in one country to have effect in another country is regulated by the laws of the country where such acts are to have effect." R. C. C. 10.

We have frequently applied the precept of this last article to interstate contracts that were entered into in other States to be executed in Louisiana, notably in Gates vs. Gaither, 46 An. p. 286.

Succession of Hernandez.

The principle is well settled that the matrimonial rights of the wife, who marries with the intention of removing into another State, must be governed by the laws of her intended domicile. *Ford's, Curator vs. Ford*, 2 N. S. 574; *LeBreton vs. Nouchet*, 3 M. 60; *Fisher vs. Fisher*, 2 An. 774.

In *Hayden vs. Nutt*, 4 An. 65, it was said that "it may be conceded that the defendant's counsel is correct in assuming that the marital rights of these parties must be regulated by the laws of their matrimonial domicile."

In *Routh vs. Routh*, 9 R. 224, it was held that "where the parties contracted marriage with the *bona fide* intention of making Louisiana the place of their common or matrimonial domicile, and in pursuance of such intention did, within a reasonable time, become domiciled in this State, then the property belonging to the wife before her marriage * * * remains her separate estate." *Conner's Widow vs. Heirs of Conner*, 10 An. 440.

In *Arendel vs. Arendel*, 10 An. 566, the facts were that at the time of the marriage in Alabama the spouses intended to fix their matrimonial domicile in Mississippi, which they accordingly did; and the court held that the right of the husband to slaves owned by the wife at the time of the marriage must be determined by the laws of Mississippi, and not those of Alabama.

In *Ford vs. Ford*, 2 N. S. 574, Judge Martin employed this expressive term, viz:

"The wife does not contract where she enters into matrimony, but when she, after marriage, migrates or removes.

"*Mulier non agit ubi matrimonium contraxit, sed ubi ex matrimonio migravit, vel divertit, agit. Cujas, ad l. 64, Exigere dotem, 164.*"

Or in other words, "the place where marriage is contracted is not so much that where the ceremony is performed, as that where the parties expect to live and settle." The general rule being "to attend to the law of the husband's domicile rather than that of the place in which the contract was entered into."

Not only is this so with respect to the wife's rights of property, subsequently acquired, but it is equally so with respect to the contract of marriage itself. The rule is stated by Judge Story, thus:

"The general principle certainly is, as we have already seen, that between persons *sui juris*, marriage is to be decided by the law of

Succession of Hernandez.

the place where it is celebrated. If valid there it is valid everywhere.

"It has a legal ubiquity of obligation." Story on Conflict of Laws, Sec. 113; citing Ferguson on Marriage and Divorce.

But that author explains in a marginal note that "the principle is established that the validity of a marriage—the word *marriage* being used in the sense of *ceremony of marriage*—depends upon the law of the place where the ceremony is performed. When the question is whether it is lawful for the two persons to be united in wedlock, there is a difference of opinion as to the law by which the validity of the marriage (the word being used to designate the union in wedlock which the ceremony is intended to effect) is to be determined;" Story Conf. Law, p. 188.

But the question immediately under consideration—that is, the binding force of the contract of marriage in jurisdictions different from the one in which it was celebrated—is distinctly settled conformably to the jurisprudence of this Court, the language of that author being as follows, viz.:

"It is no answer to this reasoning to say that every nation has a right, at its pleasure, to impose any restraints and prohibitions upon the marriages of its *own subjects*, whether they marry within or without its own territory. Admitting this to be true in the fullest extent to which it can justly be claimed, in virtue of national sovereignty, it must be quite as true, and quite as obvious, that no other nation is bound to recognize those restraints and those prohibitions as obligatory upon such subjects while they are domiciled within its own territory, or when they have contracted marriage there according to the laws thereof."

The author again says:

"Personal disqualifications, not arising from the law of nature, but from the principles of a customary or positive law of a foreign country, and especially such as are of a *penal* nature, are not generally regarded in other countries where the like disqualifications do not exist." *Id.*, Sec. 104.

This doctrine was announced by the Supreme Court in *The Antelope*, 10 Wheaton, 66, employing the emphatic declaration, viz.:

"The courts of no country execute the penal laws of another."

And the New York Court of Appeals said, in *Scoville vs. Canfield*, 14 Johns. (N. Y.) 338, viz.:

Succession of Hernandez.

"The penal acts of one State can have no operation in another State. They are strictly local, and affect nothing more than they can reach." Story's Con. of Laws, Sec. 621, p. 841.

There can be no question of the fact that the New York statute under consideration is a penal law, and that the attempt of the defendants is to have it enforced against the plaintiff by the courts of this State.

Mr. Wheaton puts the proposition thus:

"I can not but think that both the history and policy of the law require that the rule should be stated as follows:

* * * * *

"Consensual marriages, abroad, by domiciled citizens of States holding such marriages valid, will not be invalidated because the forms prescribed in the State of celebration were not adopted," etc. Wharton's Con. of Laws, Sec. 170, p. 237.

That author again says:

"A marriage abroad, it is alleged, would be a nullity if in fraud of the home law, but valid, if not in fraud of such law." *Id.*, Sec. 182, p. 264.

That author quotes approvingly the following extracts from Parsons on Contracts, viz.:

"The rights, of parties as springing from the relation of marriage, must be determined by the place where they then supposed themselves, and intended to be domiciled"—citing *LeBreton vs. Nouchet*, 3d Martin (La.), 60; *Ford vs. Ford*, *ut supra*; *Allen vs. Allen*, 6 Robinson, 104; Wharton's Con. of Laws, Sec. 190, p. 272.

Mr. Bishop puts the proposition quite tersely, thus:

"Statutes take effect only in the country of their enactment. They do not so much as bind citizens abroad, except by express words. Therefore a prohibition to the guilty party in divorce to contract a second marriage is without effect outside of the territorial limits of the prohibiting State. And this is so even under special statutory terms."

That author then illustrates by citing a Kentucky case, as follows:

"A Kentucky statute declared that the divorce for which it provided 'shall not operate so as to release the offending party, who shall nevertheless remain subject to all the pains and penalties which the law prescribes against a marriage while a former husband or wife is living;' thereupon an offending woman, whose husband has pro-

Succession of Hernandez.

cured the dissolution decree, removed to Tennessee, and there married, and the Tennessee court held the marriage to be good." 2 Bishop Mar. and Div., Sec. 1618; Cox vs. Combs, 8 B. Munroe, 231; Roach vs. Garvin, Ves. Sen. 157.

In construing the statute of New York prohibiting second marriages of persons convicted of adultery, the Court of Appeals decided that the prohibition of the statute did not invalidate a second marriage entered into in Connecticut, where it was valid; the act being in the nature of a penalty, and not in express terms, showing the legislative intent to render such marriage entered into in another State, void. Van Voorhis vs. Brintnall, 86 N. Y. 18.

In Cropsy vs. Ogden, 11 New York, (1 Kernan) 228, the court gave an interpretation to the legislative act as it existed previous to the revision of the statutes of the State, with reference to the second marriage that was celebrated *between citizens of that State*, and by an officer of that State, and said:

"The incapacity of an adulterer divorced on that ground by our own courts, to marry again in this State, during the life of the injured party, was grounded upon the views entertained by our Legislature in respect to the marriage relation."

Thorp vs. Thorp, 90 N. Y. 602, announces the same principle as that announced in Van Voorhis vs. Brintnall, and affirms that decision.

In Moore vs. Hegeman, 92 N. Y. 521, a similar question is stated and discussed—the court stating that the main question which is presented upon this appeal is whether a marriage in New Jersey was legal and valid, or illegal, as in violation of the New York statute; and answering that proposition the court said: "The statute and decree prohibiting the marriage of the guilty party can have no effect beyond the territorial limits of the State. When the laws of another State do not prohibit such a marriage by a party divorced, the validity can not be questioned in this State."

In our opinion, those decisions are strictly in keeping with our own jurisprudence, and the opinion of text writers on the subject. They distinctly hold that the prohibition of the New York law has no *extra-territorial* effect, and that a citizen of that State is at liberty to go into another State and contract a new marriage there, to which legal effect will be given by the courts of New York. That is no more than the plaintiff did. Residing in Paris, France, and Her-

Succession of Hernandez.

nandez residing in the State of Louisiana, they availed themselves of the law of New York and contracted marriage therein, intending to reside thereafter in Louisiana, and actually residing there, subsequently, it must be given the effect of a contract of marriage in Louisiana *eo nomine*; and thus considered, it comes within the principle of the decisions of the New York court.

A careful examination of authority has satisfied us that the plaintiff's contract of marriage, though celebrated in the city and State of New York, was legal and valid, and did not come within the prohibition of the New York statute.

We see no reason to alter the decree of the court *a qua*.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

We adhere to the principles of law announced in the opinion herein rendered, sustaining the marriage between the deceased, Joseph Hernandez, with Augusta L. Church, and recognizing Augusta L. Church to be the surviving widow in community of said Hernandez, and entitled to receive the legacies named in last will of the deceased; but we are of opinion now that the rights and claims of such widow in community, as well as the demands of said Augusta L. Church, for the payment of her legacies under the will, should be adjusted, liquidated and finally settled, in the *mortuaria* of the deceased, contradictorily between the executors and heirs, in the due and orderly course of the administration of the succession; and that such should have been the judgment and decree of the judge *a quo*.

It is therefore ordered and decreed that so much of our opinion and decree as recognizes the legality of the marriage between Joseph Hernandez, deceased, and Augusta L. Church; and, as decrees her entitled to receive the legacies specified in the last will of Joseph Hernandez, deceased, be and the same are maintained, but that in all other respects our former decree is set aside and the cause remanded for further proceedings in the court *a qua* according to law and the views herein expressed. It is further ordered and decreed that the judgment appealed from be so amended and corrected as to conform to the judgment and decree herein pronounced, the costs of appeal to be taxed against the appellee, those of the lower court to await final judgment herein.

Rehearing refused.

Bank vs. Janin.

No. 11,861.

CITIZENS BANK VS. ALBERT C. JANIN.

THIRD NATIONAL BANK OF NEW YORK, INTERVENOR.

The plaintiff, a judgment creditor of the defendant, had the steamboat Kinta seized.

The defendant had pledged it to the Third National Bank of New York, but remained in possession for his own account, and never completed the pledge by an actual delivery to the pledgee.

The act of pledge was drawn up in the common law form, and was intended to operate as a chattel mortgage.

It contains, as to the form of the act, the essentials of an act of pledge.

The Third National Bank, as pledgee, claimed the proceeds of the sale. The property, when it was seized, was in the possession of the sub-tenant.

It is not proved that plaintiff colluded with the defendant, and thereby gained an improper advantage.

Pledge is not made perfect by the consent of the parties; it requires absolute possession. The alleged pledgee never was in possession during the tenure of the defendant.

It (the Third National) could not obtain possession through the agency of the sub-lessee, who held possession for his lessor, the defendant.

A pledge can not be made perfect by the sub-lessee's delivery of possession without the consent of his lessor.

The obligation of the lessor to account for the property and whatever revenues were realized therefrom, binding between him and his creditor, the Third National Bank, the property not having been delivered, did not affect his other creditors, who could seize the property in his possession, or in that of his sub-lessee, who held possession for his lessor.

APPPEAL from the Twenty-second Judicial District Court, Parish of St. Bernard. *Livaudais, J.*

Henry C. Miller and Branch K. Miller for Plaintiff and Appellee:

The Third National Bank of New York is in this cause as a third opponent, claiming to be a creditor of the defendant for a large amount, asserting a chattel mortgage on the dredge Kinta, executed in February, 1890, to secure the indebtedness, and alleging that it, the opponent, was in possession of the dredge as pledgee.

From 1890, when these pecuniary transactions commenced, down to the fall of 1892, there is a mass of correspondence between the Third National Bank and Janin. In these letters the bank treats the Kinta as its property, or at least as pledged to the bank. Janin, the debtor, deals with the bank in the same spirit.

Bank vs. Janin.

This whole correspondence shows that Janin, the debtor, was at all times in actual possession of the Kinta, though speaking of his possession as held by the bank. No greater effect can be claimed of all or any of these letters.

An instrument called a chattel mortgage, executed in a common law State, purporting to sell movable property for a nominal consideration, but really designed to be a security for payment of a debt, will not be treated here as a sale, because there is neither price or consent; nor will it avail as a mortgage, because under our law movables can not be mortgaged. 1 N. S. 528; 4 An. 71; 12 An. 489; Civil Code, Art. 3281.

If this chattel mortgage is sought to be enforced here as a pledge, it is indispensable that the property, the subject of the mortgage, be placed in possession of the creditor, or that of a third person holding for the creditor, and agreed on by the debtor and creditor. Civil Code, Arts. 3133, 3152, 3162. *De Loach vs. Jones*, 18 La. 453; 8 Martin, 57; 7 An. 221; 33 An. 973; 39 An. 567.

There can be no pledge if the property is left in possession of the debtor, even if it is understood he holds for the creditor. The possession under the pledge must be in the creditor, or a third person agreed on by the parties. Civil Code, Arts. 3133, 3152; 3162; *Geddes vs. Bennett*, 6 An. 516.

Farrar, Jonas & Kruttschnitt Attorneys for Third National Bank of New York, Intervenor and Opponent, Appellant:

As security for advances, in February, 1890, the defendant pledged to the intervenor and opponent the dredgeboat Knita, several other small boats, and a saw-mill situated in the parish of St. Bernard. This pledge was executed in New York, and under the laws of that State was placed in the form of a chattel mortgage. It was never recorded in this State as such, and no attempt was ever made to execute it as such, and it is sued upon in this case, not as a chattel mortgage, but as an act of pledge.

Both parties, in writing, many times subsequent to the execution of this document, have referred to it and spoken of it as a pledge, and the testimony of the president of the bank, and the letters of Janin, show that it was intended by them, at that time, to be a pledge. The bank advanced the money, as it had agreed to do,

Bank vs. Janin.

and Janin was left in possession of the property pledged as the agent of the bank, he acknowledging himself to be such agent both in writing to the bank and verbally to the counsel of the bank.

A contract of pledge, intended by the parties to be a pledge, executed in New York, in the form of a chattel mortgage on property situated in Louisiana, and propounded as a pledge, will be enforced as such in Louisiana. Civil Code, Art. 10; Code of Practice, Art. 18; 3 Martin, 66 and 582; 8 Martin, 132; 2 N. S. 93; 4 N. S. 1; 5 N. S. 587; 11 La. 477; 19 La. 216; 8 Rob. 407; 13 An. 117; Miller vs. Shotwell, 38 An. 890; 8 N. S. 34; 11 Martin, 23 and 730; 2 An. 774.

The pledge is valid where the debtor himself is in precarious possession as trustee *ad hoc*. Conger vs. City, 32 An. 1252; Weems vs. Delta Moss Co., 33 An. 973; Jacquet vs. Creditors, 38 An. 863.

Where a debtor is trustee *ad hoc*, and makes a lease of the thing, without knowledge of the principal, the latter, when informed of the lease, may ratify it for his own account; and if the lessee consents to attorn to the principal, the lessee's possession is thereafter, as regards third persons, the possession of the principal.

The fraudulent conduct of the trustee *ad hoc* can not be availed of by a third person with knowledge of the facts.

Same counsel, on application for a rehearing, cite: Watteau vs. Fenwick, Wills, J., Coleridge, C. J., concurring, Law Report Q. B., Div. 1893, Vol. 1, p. 346.

Thos. J. Semmes against the application:

The case from Q. B., Watteau vs. Fenwick, cited by counsel, merely decides that where the business of a principal is conducted by a manager in the name of the manager, persons who deal with the manager supposing him to be the owner of the business, upon discovering the real owner of the business can hold him liable for the debts contracted by the manager in the course of the business, although such debts were contracted in violation of the secret instructions of the principal.

Bank v. s. Janin.

The New York bank here is not the owner of the property leased, and it had no power to make a lease; indeed, it persistently refused to give its consent to any lease whatever.

It is to be noticed that the chattel mortgage executed 24th February, 1890, contemplates that the debtor shall remain in possession until default is made in paying the debt, and then it authorizes the creditor to enter upon and take possession of the property and sell it.

So it appears that possession was postponed by agreement to a future day; the instrument promised to give possession *in futuro*. Therefore, the possession is one thing and the right to obtain it is another.

The opinion of the court was delivered by

BREAUX, J. The Third National Bank of New York advanced a large amount to the St. Louis, New Orleans and Ocean Canal and Transportation Co.; the payment of which the defendant undertook to secure by executing a chattel mortgage in New York of property in Louisiana.

The Citizens Bank, another creditor of the defendant, having obtained a judgment, seized the property and had it sold.

The proceeds are claimed by the Third National Bank of New York.

This bank alleged, in its opposition claiming the proceeds, that the chattel mortgage was in effect a pledge, and that it was in possession of the property as pledgee.

At a time subsequent to the date of the "chattel mortgage" the defendant executed another obligation for a larger amount, in which the property described in the deed of mortgage is referred to as having been pledged to the opponent bank of New York.

The Citizens Bank denied that opponent had a pledge; because it contends the opponent had no possession of the property pledged.

The issue involves the possession of the pledgee *vel non*.

The District Court dismissed the opposition.

The opponent appeals.

The correspondence between the defendant and the opponent discloses that the defendant acknowledged that he was the agent of the "Third National Bank," and expressed himself as quite willing to

Bank vs. Janin.

hold the property as agent for the bank; to lease it and pay that bank the rental, less the costs and expenses of operation.

In an interview with opponent's counsel it is proved that counsel said to the defendant, Janin, that there were three ways of securing their client.

One of them was to sell the property.

Another was to continue in possession as the agent and attorney of the bank, their client.

The last was that delivery of the property be made to them.

The defendant declined to accede to the first and last propositions, giving as reason that he was unwilling to sell; that delivery of the property to others would occasion expense he was anxious to avoid, but he consented to continue in the possession of the property as agent for the bank; to lease it and account to the pledgee, the bank, for the proceeds.

Counsel for the opponent informed him that it would be satisfactory to them and to their client.

He at one time sought to lease the property from the pledgee, at a rental of one thousand five hundred dollars per year.

The bank was willing to accept the proposal, but required that the contract of lease be submitted to their counsel for their examination and approval.

The defendant did not comply with opponent's desire in this respect.

Shortly after he made a lease of the boat for five hundred dollars per month, but conveyed no knowledge of this lease to the bank or its counsel.

Two days prior to the expiration of the second month of this lease he inclosed a draft to his creditor, the Third National Bank, for one hundred and twenty-five dollars, and advised its president that it was for one month's rent of the dredgeboat.

The draft was returned, and he was informed that the bank would not accept a lease without the approval of counsel.

The defendant wrote to the president of the bank that he had received the draft on his return from the interior of the State, where, he stated, the property was; that he intended to use the amount of the draft in paying a portion of the boat's liabilities; that he would devote the most of his time during the next few months in efforts to pay all claims on the property, provide a new crane, new chains

Bank vs. Janin.

and other articles needed, and pay the bank one hundred and twenty-five dollars per month.

The first lease by defendant to O. S. Burdette, of the property, was transferred by the latter to J. B. Camors, who, with defendant's consent, became lessee. The latter informed the counsel of the Third National Bank that he was renting the property from the defendant at a rental of five hundred dollars per month.

On December 22, 1892, *i. e.* immediately after having received the information, counsel notified the lessee, Camors, that the property leased to him by the defendant Janin belonged to the Third National Bank; that it had been transferred to that bank as security for a large sum of money due by Janin.

They also informed him that the debtor, Janin, was left in possession of the boat as the agent of the bank, and that his possession was precarious, and subject to be terminated at will; that they had informed Janin that his custody of the property as the agent of the bank was terminated, and that the bank ratified for its own account the lease made to him, and directed him to retain possession under the lease as the agent of their client, and pay the rental to them.

The lessee informed the defendant, his lessor, of the notice received from local counsel.

He thereafter consented to hold for the Third National Bank, as its lessee.

The property was seized at the instance of the Citizens Bank on the 6th day of January, 1893, and subsequently sold.

Counsel for intervenor called on the president of that bank, and complained of the seizure and informed him that their client was in possession.

The attorney of the Citizens Bank advised the release of the seizure.

The president persisted in maintaining it. The attorney testifies that he was informed by the president of conflicting claims to the property, and that as he was adverse to the seizure of steamboats by banks when there were claims by third persons, he stated that the bank would release the seizure; that at the time he was not advised of the claim of the Third National Bank. He states it as his impression that the president of the Citizens Bank received his information that the boat was subject to seizure from the defendant; that

Bank vs. Janin.

his communications were not very free in reference to the transactions between him and the defendant.

It is admitted that the Kinta, the property claimed to have been pledged, was a steam shovel, movable property, and not a sea vessel; that it was not registered or licensed under any laws of the United States or of the State, being nothing but a steam spade or floating steam shovel.

COMMON LAW CHATTEL MORTGAGE.

The argument for opponent, the New York bank, is that the contract was one of pledge, intended to secure the creditor's claim by pledging property in Louisiana under the form of a common law chattel mortgage.

That the chattel mortgage did not, as it purports on its face, divest the owner of his property, but that, in so far as it related to form, it contained all the elements of a pledge, and as such was enforceable in Louisiana.

This was not controverted by plaintiff's counsel, who contended that the pledgee never was in possession, and that, therefore, there was no pledge which could be enforced as such.

The effect to be given to acts such as the one relied upon in this case as being in effect a pledge, has received this Court's interpretation in several decisions.

It has never been held that they effect a translation of the property; it not being the intention of the parties to sell the property, though the word "sell" or its equivalent is used in the common law deed of mortgage.

The act is given effect as a mortgage if it contains the essentials of a mortgage or of a pledge if it contains as to form the requirements of an act of pledge.

This view has received the sanction of this Court in several decisions. *Miller vs. Shotwell*, 38 An. 891.

POSSESSION.

The privilege of pledge is subject to unbending conditions.

There must be an actual delivery, in order that those who transact with the pledgor may know that the property is held in pledge.

There should not be any good reason to consider the thing pledged in the possession of the pledgor for his account and benefit.

Bank vs. Janin.

The possession of the pledgee should be real and effective at all times; it must be apparent and well known.

As between the parties, consent is sufficient to transfer property; as to third persons, there must be delivery.

If there has been no delivery, the innocent buyer from the pledgor of the thing can not be evicted.

He could not be aware of the adverse right in the property not delivered, and in regard to which there is no contract, save that known only to the pledgor and the pledgee.

Were it otherwise, it would frequently be impossible to buy with any safety that the title to the movable is complete and legal. "It is evident that if the pledge of movables could, without delivery, have effect in regard to third persons it would be the source of great fraud and deception. When the debtor is obliged to surrender possession he can not deceive third parties dealing with him by keeping possession of the pledged articles as part of his estate, and getting credit thereby." Dalloz Nant. 313.

Possession is essential to complete a real right to movables.

The pledge withdraws the thing from the hands of the debtor and sets it aside as property subject to a pledgee's privilege.

Possession is the most sure foundation and the most striking index of the privilege. Casaregis says, preference is accorded to a pledgee on the thing pledged, because he has it in his hands.

This possession should not be equivocal, and so placed as to deceive other creditors and lead them to believe that the debtor always continued the possessor.

With reference to the pledgor's act, possible without affecting the possession and the pledgee's right, Troplong illustrates by saying, that merchandise in the creditor's warehouse may need the care of the debtor; that he may give his attention to it without destroying the right of pledge.

Third persons can not be deceived by this case, for the creditor remains in possession of the property in his own storehouse.

The principle is laid down by the French authorities that "when-ever the assistance of the debtor is necessary to the accomplishment of the object of the pledge, it ought to be permitted, provided always that it does not disturb the possession of the creditor in any respect." Casey vs. Cavaroc, 96 U. S. 484.

The learned judge in the case just cited says: "That it seems to

Bank vs. Janin.

be evident that in the French law, at least, the text of which, in this regard, is the same as that of Louisiana, a delivery by the owner of securities by way of pledges, followed by a return thereof to him, for the purpose of enabling him to collect them and apply the money to his own use, or substituting others in their stead, and with general liberty of substitution, and to appear as the owner and possessor thereof in his dealing with others (the title of the securities not being transferred to the creditors), is not such a delivery of possession as is necessary to establish the privilege due to a pledge as to third persons. It would be contrary to the very letter of the law to allow such a transaction to have that effect. It would not be mere evidence of fraud, which might be rebutted by counter evidence; but it would be contrary to the rule of law adopted to prevent fraud. In other words, as to third persons, it would not be a pledge at all within the meaning and requirements of the law. We think that the decisions in Louisiana lead to the same conclusion."

In support of the proposition of opponent that the right of pledge is complete where the debtor himself is in the precarious possession of the thing pledged, as trustee *ad hoc*, we are referred by opponent's counsel to the cases of Conger vs. City, 32 An. 1252; Weems vs. Delta Moss Co., 33 An. 973; Jacquet vs. Creditors, 38 An. 863.

In the first case, the pledge was statutory; moreover, the dictum had no reference to the conclusion reached, for it was decided that the pledge had been destroyed by a sale of the property.

In the second case cited, the property had been placed in the possession of an agent.

The court said in that case: "Under the provisions of Art. 3162, which allows the possession of the pledgee to be vested in a third person, agreed upon by the parties, we find that these transactions show such a possession in the pledge as the law requires, even under a vigorous construction of its provisions."

In the last case cited, the property was placed in the hands of an agent, who held the key of the building in which it was.

This agent testified that he exercised control over the property for about ten months, and took care of it and cleaned the machinery. He was paid for his services as keeper. With his permission, and that of the pledgee, the pledgors used the machinery at times.

The keeper at all times, however, retained possession:

Bank vs. Janin.

Only in the last case cited there was any reference made to the use of the property by the pledgor.

The occasional use of the property pledged, with the consent of the pledgee, did not dispossess the keeper, who remained in charge, as required (said the court) by Art. 3162 of the Civil Code.

The possession of a creditor is not inconsistent with the open well-known co-operation of the pledgor, when the latter's co-operation is not incompatible with the idea of the possession of the creditor.

In the case at bar, while the defendant Janin was in possession no third person suspected that he was operating the boat for any one's account save his own.

When it is considered that the boat was at some distance, in charge of the owner and pledgor, who informed no one of his agency; that it had been leased by him and the rents collected for his account, it becomes manifest that the pledgee, during the pledgor's active operations, was not in possession.

THE ILLEGAL AND IMPROPER UNDERSTANDING CHARGED.

An understanding between the plaintiff and the defendant, such as charged by the opponent, would operate as a bar to considering the plaintiff as a third person.

If the third person conspired with a pledgor to obtain an advantage, he would not be in the attitude of a person not interested and without notice.

The only testimony introduced was that of plaintiff's attorney, who gave it as a mere impression that the president of the Citizens Bank obtained his information from the defendant.

A similar question to that presented in the case at bar, at this point, received consideration in the case of *Rawlins et al. vs. Sheriff et al.*, 45 An. 67.

This Court said, in that case, "If they had legal claims — they (the creditors) were entitled to proceed, and were not prejudiced by the mere circumstance that their information came from the debtor."

In the case at bar, it is not positively shown by whom the creditor was notified of the possibility of making a valid seizure of the property of the pledgor.

The burden of proof to establish collusion between the common

Bank vs. Janin.

debtor and the president of the plaintiff bank rested with the opponent.

"The party having the burden is the party who, if no proof is offered, will be defeated in the suit."

The fact that the plaintiff's president did not testify did not have the effect of shifting the burden of proof, and give rise to a presumption of knowledge on his part of the obligation of the defendant to the opponent.

The plaintiff was a third person, against whom it is not shown that it had knowledge of any pledge on the part of the defendant to the opponent prior to the last lessee's possession, Camors.

As against Janin the bank had an absolute right to seize the property in his possession or in the possession of his lessee.

AS SUBROGEE OF LAST LESSEE IS THE THIRD NATIONAL BANK A
PLEDGE?

This brings us to the consideration of the last point involved in the case.

The opponent, the New York bank, having recognized the lease to Camors and having through him obtained the possession of the boat it held when the seizure was levied, the important question is presented as to whether it was legally possible for this creditor to obtain possession and control, through Camors, the lessee of Janin, of property that had been pledged to it.

The principle is well settled that the title of the lessee is in fact the title of the lessor.

He comes in by virtue of the lease, he holds by virtue of the lease, and upon it he relies to maintain and justify his possession. He acknowledges thereby the title of the lessor, and he can not invoke the title of another and change the nature of his possession.

He is not permitted to deny that the lessor had a title to possession at the time that he, the lessee, came into possession. 3 Am. and Eng. Ency. 188.

The law regarding pledge is plain.

"It is essential to the contract of pledge that the creditor be put in possession of the thing given to him in pledge, and consequently that actual delivery of it be made to him, unless he has possession of it already by some other right."

Bank vs. Janin.

Pledge is not made perfect by the consent of the parties. It requires absolute possession.

As to creditors the pledge was not complete when Janin was in possession.

The property was subject to seizure. The lessee, at the end of the lease, owed possession to his lessor, and not to his creditors. They had no claims upon him. Let us assume that the Third National Bank called on Camors to deliver the property and that he refused to surrender possession.

The Third National never having been in possession, Camors had the absolute right to decline to surrender his possession.

Not having the authority to compel delivery, they were equally without authority to obtain possession by virtue of a contract with the lessee.

Delivery of possession to the pledgee must be given by the pledgor, and not by his lessee.

The obligation to deliver devolved upon the debtor, and not upon the one who held under a lease.

As between Janin and the National Bank, the pledge and its fruits were due by the former to the latter.

This indebtedness could become secured as intended by the creditor only after asserting the right contradictorily with the debtor.

Third persons have rights distinct from those of the pledgor.

As to them, there must be actual delivery and no control retained of the property by the owner for his personal account.

In order that there may be no question about the pledge, there must be absolute compliance in this respect.

La loi, says Baudriè-Lacantinerie, se montre pleine de sollicitude pour les interets des tiers auxquels ce privilege pourra prejudicier. Vol. 3, p. 599.

The property must be placed and remain in the possession of the creditor, or of a third person agreed upon by the parties.

It was not in possession of the creditor, nor in possession of a third person agreed upon by the parties; it was therefore subject to seizure and sale to pay and satisfy other indebtedness of the debtor.

Judgment affirmed at appellants' costs.

APPLICATION FOR REHEARING.

WATKINS, J. Third opponent resists a levy by the Citizens Bank under *f. fa.* against the defendant on the following grounds, viz.:

Bank vs. Janin.

That at the time of the seizure the dredgeboat was in its possession, through its tenant, J. B. Camors, who was using and operating the same for account and benefit of the opponent under a lease.

That at the time of said levy under *fi. fa.* the dredgeboat was in the opponent's possession, and that he held said property as a pledge to secure a debt of eight thousand four hundred and seven dollars and seventy-three cents, by virtue of a written act of pledge signed by the defendant in execution, of date February 24, 1890, under which the property was delivered; and that opponent has held it in *actual possession* since that date. That, at various times since, defendant has recognized his rights thereunder.

The answer of the defendant is a denial that the property seized was at date of seizure, or at any other time, in third opponent's possession, through Camors or any one else—the fact being that the boat was, at time of seizure, in the possession of the defendant, Janin, through Camors, under contract of lease, signed by the defendant as owner; and said boat had been continuously and uninterruptedly in defendant's possession as owner since it was built in 1889.

The answer of the Citizens Bank was that the third opponent had no pledge or possession of the property seized, etc.

On the trial there was a judgment dismissing the third opposition and sustaining the seizure of the Citizens Bank, and third opponent has appealed.

Our opinion and decree affirm the judgment.

The application for rehearing goes upon the following grounds, to-wit:

1. That the Court erred in holding that the possession of Camors, at the time of the seizure, was not in the possession of the Third National Bank of New York.

2. That the Court erred in holding that the possession of Camors *could not* be made the possession of the bank.

3. That the Court erred in holding that Camors had the absolute right to decline to surrender his possession.

4. That the Court erred in holding that the intervenor had no authority to compel delivery of the boat to Camors.

5. That the Court erred in holding that the obligation to deliver devolved on the debtor, and not on Camors holding the lease.

6. That the Court erred in *refusing* to hold that the Citizens Bank was bound by the same estoppels Janin was bound by.

Bank vs. Janin.

On this application the argument of third opponent is that (1) as the court found as a fact, that Janin had possession of the boat as the agent and representative of the bank under his promise to rent the boat and account for the proceeds to the bank, any lease he made must have been, in law, for the account of the bank; (2) that as the court did find that Janin did lease the boat, and so informed the bank, this finding shows that Janin acknowledged the legal duty which was upon him, and that the lease was for the account of the bank.

Or in other words that while in point of fact the lease was from Janin to Camors, Janin was the agent of the bank as an undisclosed principal; and all that was necessary to put the contract in shape was that the bank should *disclose* to Camors, the lessee, that it was principal instead of Janin, and have Camors recognize it (the bank) to put Camors in possession for the bank; and in this manner continue in force and efficacy the act of pledge from Janin to the bank, and defeat a seizure of the boat by one of Janin's creditors.

It is further claimed that this course was pursued by the bank, and due notice was given to Camors, and same was accepted by him and acquiesced in by Janin. And counsel's argument is further that the seizing creditor of Janin is bound by the same estoppel that Janin is, and concluded thereby.

The theory of our opinion is that, while it is true that Janin acknowledged himself willing to hold the boat, as the agent of the bank, and account to the bank for the rentals, yet shortly afterward, he made a lease to Burdette, who transferred it to Camors for five hundred dollars per month, yet did not report that fact to the bank.

That the latter, Camors, informed counsel for the bank, that he had leased from the defendant at five hundred dollars per month; and counsel informed him that the boat belonged to the third opponent as security for a debt; and that the boat had been left in Janin's hands, as agent of the bank; and that his possession was precarious, subject to termination at will. He further stated to him that he had informed Janin that his custody was terminated, and that the bank ratified the lease for its own account and directed him to retain possession for the bank. The lessee gave the defendant notice of the information he had received; and he thereupon consented to hold for the bank.

It is conceded that the defendant, primarily, gave third opponents a chattel mortgage on the property, having the effect of a *pledge* on the property.

On this state of facts the opinion holds that opponents' possession of the thing pledged was not real, actual and effectual at all times, or in other words there was nothing to advise the Citizens Bank of Camors holding, as pledgee of the bank, because his contract of lease from Janin showed that the latter was the owner, entitling them to seize; that there is nothing in the transaction between Janin and Burdette, nor in that between Burdette and Camors, to put the Citizens Bank on notice of the pledge of Janin to third opponent, nor that the bank was an undisclosed principal in the contract of lease.

Claim is not made in this case that the bank and Janin had agreed upon a third person to hold the property; and in that view the opinion concurs. And our opinion still is that third opponent never had physical, actual possession of the thing pledged. But it was always in the actual possession of Janin and his lessee; and while perfectly good as between the parties, it had no effect as to third persons and seizing creditors of Janin.

Rehearing refused.

Miller, J., recused.

No. 11,538.

STATE OF LOUISIANA VS. CORA WEST ET AL.

RE-EXAMINATION OF JUROR ON HIS VOIR DIRE, NOT PREVIOUSLY DECLARED COMPETENT.—A juror having been examined on his *voir dire*, was accepted by the State and by the defendant.

The juror, not yet sworn, informed the court of his disqualification, in regard to which he had not been questioned.

He was re-examined only as to the disqualification disclosed. It was proved and the juror was ordered to stand aside.

It does not appear that the trial court exceeded the bounds of the discretion with which it is invested, in having ordered this juror to stand aside; moreover, it is not shown that the defendant exhausted her peremptory challenges. There was therefore no prejudicial error committed subject to review.

FIXED OPINION OF A JUROR.—A juror having testified on his *voir dire* that he had reached a conclusion as to the guilt or innocence of the accused, unalterable by any testimony, was excluded from the jury.

He had been examined by the District Attorney.

Counsel for defendant asked to question the juror, which was refused.

State vs. West et al.

It is not shown that the juror had not been sufficiently examined to establish his prejudgment, nor that in consequence defendant's peremptory challenges were exhausted.

To establish the bawdy character of the house and its bad reputation, the evidence of the persons frequenting it was admissible.

PROOF OF REPUTATION, WITH OTHER FACTS AND CIRCUMSTANCES.—The bawdy character of the house may be shown by its general reputation (and the bad reputation of the persons frequenting the house), with other evidence leading to that conclusion.

ON APPLICATION FOR REHEARING.

THE CHARGE OF THE COURT TO THE JURY.—The trial judge, in his statement in the bill, says: "that he had instructed the jury on the subjects in regard to which special instruction was asked by the defendant." There is no record of the instruction given.

The charge is presumed to have been correct, in the absence of any exception or of a request to instruct the jury in writing.

Moreover, common reputation as to the character of the defendant, and of the house which she kept, was admissible. It was left to the jury to determine as to the weight of this and other evidence.

A PPEAL from the Eighteenth District Court, Parish of Lafourche.
Caillouet, J.

M. J. Cunningham, Attorney General, and B. F. Winchester, District Attorney, for the State.

Clay Knobloch & Son Attorneys for Defendant and Appellant:

In a criminal case a juryman examined on his *voir dire* by the State, and tendered to and accepted by the accused as a competent juror, should not be further questioned by the State with a view to challenge him for cause. 5 An. 320.

Witness should not be allowed to testify to opinion, save in rare and exceptional cases; this case must be classed among those where the rule applies that witnesses can only testify to facts, and that the jury alone can form opinion. 37 An. 268; 38 An. 450.

The State not objecting to a question propounded on cross-examination to a State witness to show bias, prejudice and feeling, the witness alone objecting to answer, on no legal, but on sole ground that the question was not a fair one, and the court not being called upon to rule in the matter, but volunteering to rule that the question was not relevant and should not be, as it was not answered by the witness, there is error in the ruling. Great latitude is permitted on cross-examination in criminal cases to

probe the feelings, prejudices and motives of a State witness. Questions to that end are permissible, and may be repeated in various forms when it becomes necessary to test the fairness and impartiality of a witness. 38 An. 153; 37 An. 78.

In a criminal case where the State introduces three witnesses to testify to general reputation, and two to testify as to particular facts from personal knowledge, it is error for the trial judge to refuse to charge that evidence from personal knowledge, although of negative nature, outweighs evidence as to general reputation.

Evidence of a negative nature may, under particular circumstances, not only be equal but superior to positive evidence. 36 An. 84.

Where the defendant is charged with keeping a disorderly brothel, evidence of general reputation is not admissible, it being necessary to sustain the indictment that particular facts which constitute the offence should be proved. Wharton on American Criminal Law, Sec. 668.

The opinion of the court was delivered by

BREAUX, J. The defendant was convicted of keeping a disorderly brothel and was sentenced to one month in parish prison, and to pay a fine of three hundred and one dollars, and in default of paying the fine to two months additional in the parish jail. From this sentence she appeals.

She relies for reversal of the verdict and sentence on a number of bills of exceptions, reserved to the ruling of the trial judge.

EXAMINATION ON VOIR DIRE OF JUROR TENDERED.

The court's recitals in bill of exceptions No. 1, to the exclusion of juror, are that the juror had been accepted by the State without having been interrogated as to any opinion about the case.

He had been accepted by the defendant, but had not yet been sworn. The unsworn juror at that time informed the court that he had not been asked if he had formed an opinion.

The District Attorney applied for permission to reopen the examination, to which counsel for the defendant objected on the ground that it was too late, and urged that the juror should be sworn.

The bill of exceptions does not show that the juror accepted by the

State vs. West et al.

State and the defendant had been pronounced competent by the court, and that he had been directed to take the oath.

It is the general rule to urge all objections to a juror *before* he has been sworn. *State vs. Diskin*, 34 An. 920.

The re-examination should not be opened as a general thing after the juror has been pronounced competent and has been called to the book to be sworn. But if, prior to pronouncing him competent, the court has good reason not to be satisfied with his competency questions may be propounded by the court without thereby committing an error. The court's attention having been called to an oversight, it directed the District Attorney to examine the juror upon the point overlooked and none other.

This Court must presume that the trial judge properly exercised the discretion with which he is entrusted. *Belt vs. The People*, 97 Illinois, 466; *Hendrick's Case*, 5th Leigh, 709; *Wharton's Crim. Law*, 7 Ed., Sec. 3130.

NO PREJUDICIAL ERROR PROVED.

The second, third and fourth bills of exceptions were taken to the court's rulings and refusal to permit counsel for the accused to propound questions to a juror on his *voir dire*.

The following is, in substance, the statement of the court, copied in the bills of exceptions:

That the juror answered on his *voir dire* that he had formed a fixed and unalterable opinion which could not be changed by any evidence.

He was challenged by the District Attorney for cause. The court sustained the challenge and ordered the juror to stand aside.

The request of the counsel for defendant was refused, the court states, for the reason that the juror on account of the bias shown by him was incompetent.

Counsel for the State and counsel for the accused should have reasonable opportunity to ask the juror such questions as may test his competency.

We would feel compelled to remand the case if the error appeared prejudicial to the accused.

The records do not disclose that the accused had exhausted her peremptory challenges.

She, therefore, was not, because of the ruling excluding the juror, compelled to accept an objectionable juror.

She had in her control the remedy the peremptory challenge secures. Wharton Crim. L., 7 Ed., Vol. 3, Par. 3152.

Moreover such error, that is an error in a ruling rejecting a juror, is not, as a general thing, as prejudicial as an error committed in a ruling selecting a juror.

The principle is laid down always subject to the limitation that prejudicial error in an appealable case is not always subject to review. "Where a cause has been tried by an impartial jury, although the judge, on the application of one of the parties and against the consent of the other, may have *rejected* a juror for a cause of questionable sufficiency, such rejection does not afford a ground of complaint if justice has been done in the premises." Thompson and Merriam, Sec. 271.

AN IRRESPONSIVE ANSWER.

The sixth bill of exception was taken to the court's ruling permitting the prosecution to ask the witness the question: "From the general surroundings and things seen and heard, what kind of house did he think it was?" The question did not elicit the answer sought.

The witness replied negatively. "He did not know whether it (the house) was a brothel or not" is the answer stated in the bill of exceptions. The purpose of the prosecuting officer in propounding the question was defeated by witness' answer, and there is in consequence no issue for decision. The objection is unsupported by the facts, and therefore unfounded.

THE COURT'S DISCRETION PROPERLY EXERCISED.

A bill of exception was taken to the ruling of the court permitting the prosecuting officer to ask the sheriff, who was testifying as a witness, to give the names of persons who had spoken to him on the subject at issue.

It was legitimate and proper to seek information appertaining to the issues of the case and obtain the names of those who had spoken to the witness about the house kept, it was charged, by the defendant as a brothel.

IRRELEVANT QUESTION.

The eighth bill of exceptions shows the following:

That the witness is a lawyer. He testifies that the accused kept a bawdy house. He was asked to name the persons who had spoken

State vs. West et al.

to him on the subject, to which he replied that he had spoken about it to the judge and other officers of the court.

The defendant, availing herself of the statement, sought to obtain from the witness an expression of opinion regarding the effect of his own utterances, in contributing to the bad reputation charged upon her.

The witness declined to answer, on the ground of the unfairness of the question propounded.

The trial judge states:

"Before objection to answer by the witness the District Attorney suggested that the question was objectionable, but as the witness was a lawyer he left it to him to answer or not; whereupon the witness appealed to the court, and announced he would not answer the question unless compelled to do so by the court. The court, considering the matter sought to be elicited by the question to be utterly irrelevant, ruled that the witness was not bound to answer."

In declining to answer, the witness did not add to or detract from the effect of his testimony. Any answer responsive to the question would have been irrelevant.

"We must," says Mr. Wharton, in his book on Criminal Evidence (p. 472), "again notice the important distinction between questions in chief, whose object is to bring out facts important to the maintenance of public justice, and questions in cross-examination, whose object is merely to harass a witness."

NO APPARENT INJUSTICE.

Counsel for the defendant also complains of the refusal of the trial judge to grant him time to write the question propounded to this witness, so that there would be no dispute about the nature of the question.

The defendant's rights were not prejudiced by the refusal.

Had the judge *a quo* agreed with defendant's counsel in the statement that the District Attorney remained silent until after the witness refused to answer and the court had ruled in the witness' favor, the result would have been the same.

A witness may of his own motion, without the assistance of the District Attorney, provoke a ruling of the court, protecting him from answering a question not material to the issues involved and

relating to the effect of his own utterances in establishing defendant's reputation.

BAD REPUTATION WITH OTHER EVIDENCE ADMISSIBLE TO ESTABLISH OTHER CHARGES.

Bills of exceptions were taken to the court's ruling in admitting testimony to establish the bad reputation of the house of the defendant.

It is not shown by the bill of exceptions that the testimony of bad reputation was the only evidence received, and that there was no other testimony admitted to establish the ill fame.

Reputation accompanied with other evidence, showing that the house has actually been resorted to for the purpose of prostitution, is admissible as tending to establish the offence. *State vs. Mack*, 41 An. 1081; *Drake vs. State*, 17 N. W. Reporter, 117; *Wood's Law of Nuisance*, 40.

THE REQUESTED INSTRUCTION PROPERLY REFUSED.

The defendant requested the trial judge to charge that "direct evidence is stronger and overturns evidence as to general reputation."

This is preceded by the statement of defendant's counsel, in the bill of exceptions, that the State examined five witnesses, three of whom testified as to the general reputation of the house, and ten of whom testified as to particular facts from personal knowledge, that the house was a beer saloon.

This statement did not receive the approval of the court *a qua*, whose recitals in the bill of exceptions are that the evidence of the two witnesses on the point was more in the light of negative than affirmative testimony, and that he had fully charged the jury on the subject matter.

Credibility is determined by the jury, under such instructions as may be given by the court.

The defendant was without right to instructions to the jury that would have accentuated the difference between the testimony of two of the witnesses who swore to certain facts, thereby discriminating from the testimony of three witnesses who testified as to the ill fame of the house in the community.

Moreover, it was not the duty of the court to instruct the jury

State vs. West et al.

that evidence of general reputation was subordinate to and of no importance as compared with direct evidence.

The bill of exceptions does not establish that these witnesses were the only witnesses who testified, and that upon their testimony exclusively the case was decided.

Principles should be laid down to guide the jury in weighing testimony, but it is not incumbent upon the court to instruct the jury that testimony of certain witnesses to prove certain facts is of more weight than testimony offered to prove reputation.

The court properly declined to give the instructions tendered.

This completes the review of the proceedings, and we find no ground to set aside the verdict and sentence.

Judgment affirmed.

ON APPLICATION FOR A REHEARING.

BREAUX, J. The defendant in her application for a rehearing, through her counsel, argues anew the different grounds previously argued.

They have been considered and passed upon in our decision.

We will nevertheless review again two of the points presented.

They are first, that the trial court erred in not instructing the jury as requested that "direct evidence is stronger and overturns evidence as to general reputation."

The trial judge in the bill of exceptions states that he based his refusal on the fact that "he had already previously fully instructed the jury on the subject matter." Considering the points presented with reference to the issues as presented by the trial judge, we do not discover that he erred in refusing to give the charge requested. The weight to be given to the statement of facts in the bill of exceptions is well defined in a number of decisions of this Court. The trial judge certifies to the facts, and unless it is shown that they are incorrectly stated, they are considered as correctly narrated. *State vs. Broussard*, 39 An. 671.

Second—That particular facts constituting the offence must be proved, and "not general reputation," is the other instruction requested.

Mr. Woods, in his treatise on the Law of Nuisances, announces the principle of evidence on this point, as follows:

"Mere reputation is not sufficient, for that is often wholly unreliable

Succession of Lange.

and unworthy of credence; but when accompanied with evidence showing the dissolute character of the inmates and of the persons visiting them, it is admissible as tending to establish the offence" Par. 50, Sec. 29.

In Dillon it is stated "that the common reputation as to the character of the defendants, and of the houses which they keep, is admissible." Dill. Mun. Corp., Vol. 1, p. 412, note 1, 2d Ed.

In considering this point we did not feel authorized, in the absence of proof, to assume that there was evidence only of bad reputation offered and admitted.

That portion of the charge of the trial judge narrated in the bill of exceptions, and the finding of the jury, negative the grounds upon which the defendant based her application for a new trial on this point.

Defining of evidence (urged by the defendant) to make out the case (of this we have no proof) offers no ground for reversal on appeal.

The case comes to us as made out on testimony of reputation, accompanied, we must presume, with other evidence establishing guilt.

The rehearing is refused.

No. 11,447.

SUCCESSION OF MRS. HARRIET A. LANGE.

The purchaser refused to accept the title tendered to him as adjudicatee, on the ground that the minor heirs were the owners of the property, and not the succession of the *de cujus*.

That in consequence their property can not be sold without the exact observance of the formalities provided for the sale of minors' property.

PROPERTY OF A SUCCESSION SOLD TO PAY DEBTS.

The Court holds that the property belonged to the succession, and not to the minors, who only had a residuary interest, and that, as property of the succession, it could be sold by the administrator to pay the debts of the succession.

Where a sale is made, for the payment of debts, of property belonging to a succession in which minors have an interest, it is not necessary to observe the formalities required by law for the alienation of minors' property, the interests of the minors being residuary.

THE AMOUNT OF A TUTOR'S BOND.

The Court *ex officio* holds, further, that though the property was sold in the succession for the payment of debts, and without the formality for the alienation of minors' property, the tutor, who is to receive the price, in the interest of all parties concerned, must furnish bond in the amount required by law.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

48	1017
106	300
48	1017
125	709

Succession of Lange.

Dinkelspiel & Hart Attorneys for Administrator and Appellee:

46 1018
f118 558

The proceedings for the sale of the property at private sale to effect the partition, were strictly in accordance with law, as approved by this Court, in the cases of *Durruty vs. Musacchia*, 42 An. 357; and *Bruhn vs. Firemen's Building Association*, 42 An. 481.

Felix J. Dreyfous and B. McCloskey Attorneys for Defendant, Appellant:

The administrator has no right to provoke a sale for the mere purpose of effecting a partition between heirs where there is no necessity thereof for the payment of the debts. *Hebert vs. Hebert*, 22 An. 309; *Hotchkiss vs. Dodd*, 13 La. 86; *Pitkin vs. Thompson*, 14 La. 272; *Bank vs. Delery*, 2 An. 648; *Succession Morgan*, 12 An. 153.

A sale of minors' property can only be effected under the requirements of Art. 339 *et seq.*: (1) that a family meeting must advise the sale; (2) that the judge approve the deliberations of said family meeting; (3) that the sale be made at public auction, and (4) that the property should not be sold for less than the appraised value in the inventory. Citing also *Succession of Dumestre*, 40 An. 573.

The opinion of the court was delivered by

BREAUX, J. The purchaser of a city lot and the improvements thereon appeals from a judgment condemning him to accept the title tendered.

The purchaser admits that he bought at public adjudication, but refuses to accept title on the ground that the property was vested in the children of Mrs. Harriet A. Lange as to one-half, and that the other half was burdened with a general mortgage, resulting from her qualification as tutrix.

James Wilson acquired the property on 31st of October, 1871, and died a short time after that date.

His succession was opened and Mrs. Harriet A. Wilson, his widow, was placed in possession of the property as owner of the undivided half and her children of the other half.

At a date subsequent on her petition a family meeting was held.

They, the family meeting, fixed the value of the property, assisted

Succession of Lange.

by the report of experts, and recommended a private sale to effect a partition.

The proceedings of the family meeting were approved by a judgment of the court. Mrs. Harriet A. Johnson, in her individual capacity, and acting also as tutrix of her minor children, under authority of this judgment, sold the property at private sale to Mrs. Mary Renturia. In 1880 Mrs. Renturia sold it to Mrs. Ellen Markey, widow of John Johnson.

After the death of Mrs. Harriet A. Johnson, who was the wife of Lange at the time of her death, Mrs. Ellen Markey, widow of John Johnson, signed a deed containing the following declaration:

"That though said purchase was made in her name, that said property then and always has belonged to Mrs. Harriet Augusta Johnson, then the widow of James Wilson and afterward wife of Henry J. Lange, and that this appearer never had any interest in, or claims to, on or against said property, but the title thereto was simply placed in her name as a matter of convenience."

THE DECLARATIONS CONTAINED IN THE DEED OF ACKNOWLEDGMENT DO NOT AFFECT THE PRECEDING TITLE.

The title passed regularly from Mrs. Harriet A. Wilson (formerly Mrs. Johnson and subsequently Mrs. Lange) personally and as tutrix to Mrs. Renturia.

The records do not disclose any irregularity in the title from the former to the latter. It was absolutely the property she sold to Mrs. John Johnson. This authentic deed of her agent was dated the 30th of September, 1880, transferring the property. Mrs. John Johnson, for reasons not explained, in 1890, after the death of Mrs. Harriet A. Lange, placed a title of record recognizing the ownership as being in her succession.

Counsel for the defendant in rule argues that the acknowledgment of Mrs. John Johnson had the effect of reinvesting the minors with the ownership of half of the property.

Her declarations, in her deed to the succession, of themselves, without any other fact or circumstance going to show simulation and fraud in the proceedings preceding the title of Mrs. Renturia, did not have the effect of clouding the latter's title to the property.

She, Mrs. Renturia, paid for it a full and fair consideration and sold it for a clearly expressed amount.

Succession of Lange.

During ten years Mrs. Renturia was the unquestioned owner of the property.

It does not appear that her vendee had any right on the property.

She, Mrs. Renturia, was a stranger to the declaration her vendee chose to make.

Those declarations bind Mrs. John Johnson, but they have not the effect of destroying the right of her vendor, Mrs. Renturia, the former owner.

The property in the soil was in her name, and that fact must continue unaffected by any *ex parte*, unexplained declarations of her vendee.

The title, by the acknowledgment of Mrs. Johnson, having passed to the succession of Mrs. Harriet A. Lange, it was subject to sale for the payment of the debts of the succession.

Her heirs, the Wilson children, have no interest in the property. It was owned exclusively by the succession.

The administrator applied to sell this property to pay the debts.

The adjudicatee (defendant and appellee) has acquired title under the adjudication of property of the succession.

The property is considered as belonging to the succession and not to the minors. *State vs. Judge*, 17 L. 500; *Succession of Ira Smith*, 9 An. 107; *Succession of Fluker*, 32 An. 292; *Towle vs. Weeks*, 7 L. 312.

THE SECURITY THE TUTOR SHOULD FURNISH.

For his protection as owner as well as for the protection of the minors, we have considered all the proceedings, and to the end that the protection be complete, we notice *ex proprio motu*, the insufficiency of the tutor's security, in order that proper remedy may be applied.

From the records we glean that the administrator, who applied for this rule, and who is also the tutor of James Wilson's minor children, has not, in so far as appears on the face of the papers, furnished bond as tutor in the amount required.

It was made evident in these proceedings that it was to the interest of all concerned to sell the property.

The adjudication will now be followed by a deed and the payment of the price.

Having thus affirmed the validity of the title, we feel compelled to state that the tutor must comply with the law regarding security he should furnish, before he can be permitted to receive the amount of

Succession of Lange.

the sale due by the adjudicatee. The tutor, in the first place, executed a tutor's bond in the sum of one thousand dollars. This was not sufficient if the record is taken as a basis.

Subsequently he furnished a special mortgage in lieu of this bond.

The property mortgaged was appraised at two thousand five hundred dollars, being twenty-five per cent. more, it is alleged, than the amount to which these minors are entitled.

The inventories made and the facts appearing of record are proof that the security (in the present condition of affairs and the unsettled state of the rights of the minors) is not in amount twenty-five per cent. over and above their claims.

The price of the property adjudicated to the plaintiff in rule, in this case, is four thousand nine hundred and fifty dollars.

Of this amount, possibly the minors own half.

There is other property in which they have at least a residuary interest. It may be that there are debts to be deducted which will reduce their claims. Of this we have no evidence before us.

Until a satisfactory showing is made, and such security is given as will prove acceptable to the District Court, the purchase price of the property involved in this case must remain in the immediate control of that court.

We know that our learned brother of that court will bring to bear thoughtful and wise discretion to amply protect these minors.

The title in this case is not dependent upon the sufficiency of the security offered to protect the minors, for another remedy lies for the protection of the minors.

But the law is always zealous for the protection of the interests of minors, and courts are not inclined to withhold their equity powers when needful in their behalf.

In rendering judgments, conditions may be included as may be equitable to shield them, and at the same time protect those who become owners of property in which they have a residuary interest from other litigation.

The many decisions classed under the head notes "Conditions of Judgment" and "Equity" by Mr. Hennen, in his digest, establish broad grounds in support of equitable principles.

They support the correctness of our conclusion in this case, in requiring *ex officio* that the tutor shall furnish additional security

Railroad Co. vs. Faïrex.

if further statements prove that the facts regarding amounts due them are as appear at this time in the record of appeal.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed, and it is further ordered that the minors' rights be protected by inquiry in the matter of the tutor's security, in accordance with previously expressed views, and that appellee pay the costs of appeal.

No. 11,386.

ST. CHARLES STREET RAILROAD COMPANY VS. O. A. FAIREX.

A person against whose property a judicial mortgage was recorded acquired as forced heir an undivided one-third in a succession. In an act of compromise she transferred her undivided one-third interest to the instituted heir and owner of the remaining two-third interest.

The property being immovable the plaintiff, a judgment creditor, instituted the hypothecary action against the purchaser and third possessor of the undivided one-third.

The recorded judgment against the heir affected the mortgageable property thus owned to the amount of the *residuum*.

The property subject to the mortgage, though transferred to the third possessor by the heir, is not free from all claims of the succession if it be shown that it was affected by a mortgage at the time of the transfer, but that the instituted heir bought it as not being subject to any judicial mortgage.

It is claimed that the heir and debtor to the plaintiff was indebted in a large amount to her late daughter, from whom she inherited.

The compromise was made with the third possessor and only co-heir upon the basis of the alleged indebtedness of the mother and forced heir, who is plaintiff's debtor.

The judicial mortgage creditor is not benefited by the compromise made between the forced heir and the instituted heir, nor should its interests as judicial mortgage creditor be prejudiced thereby.

To establish the right of the judicial mortgage creditor, the amounts for which the indebted heir and judicial mortgage debtor is accountable should be deducted from the gross active assets.

The residuum accruing to the heir in the immovable property will be affected by the judicial mortgage.

Plaintiff can have no better right in the property than his debtor, unless he can show some fraud or collusion by which his rights have been impaired.

Quoad the compromise and the transfer of the property the original judgment claim, if valid, remained on the property and during the time prescription did not affect the judgment.

The consideration that entered into the contract of compromise must be proved and the *residuum* established by proceedings required.

To that end the judgment appealed from is annulled and the case is remanded to be tried in accordance with the views expressed.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

46	1022
46	1496
46	1022
48	427
48	745
46	1022
110	37
46	1022
123	155

Railroad Co. vs. Fairrex.

H. H. Hall Attorney for Plaintiff and Appellee:

When a person, against whose future property judicial mortgages are recorded, acquires, as forced heir, an undivided one-third in and to a succession, largely composed of real estate, and in order to avoid the mortgages, sells her said interest in said succession before liquidation thereof, the purchaser who buys with full knowledge of the facts, and who is a party to the succession proceedings, can not set up as a defence that the succession was not liquidated, and that the mortgages did not attach by reason of the failure of the parties to partition the property thereof.

In such case the purchaser and seller having, by their voluntary and tortious act, prevented the liquidation, the hypothecary action will lie against the former.

A consent judgment of a person against her former tutor, rendered without account and proof, is null. 15 An. 225; 33 An. 35; 5 An. 499; 29 An. 532; 30 An. 1192; 37 An. 803.

Such a judgment is prescribed by ten years, and when not revived can not be considered.

Such a judgment not recorded, even if valid, could not prime a judicial mortgage duly recorded.

Such a consent judgment has no effect against third persons.

Albert Voorhies Attorney for Defendant and Appellant:

Mortgage presupposes that, at the time, the debtor is the owner of the specific property, upon which the creditor claims his right.

A succession is an entirety, including all properties, rights, debts and charges. The heirs inherit undivided shares in the succession as an entirety, but are not at once vested with absolute right of ownership of, or *dominium* over each specific piece of property inventoried. Their rights are ultimately determined by regular course of administration or partition.

“A creditor of the heir, or of one of the heirs, can not seize and sell the title and right of his debtor to a specific part of the property by him inherited; the seizure must be for the whole of his said rights, as well as the charges, with which they are burdened.” Mayo vs. Stroud, 12 R. 108.

Railroad Co. vs. Falrex.

An heir in indivision may mortgage his undivided eventual interest in specific property of the estate; but the mortgage is not valid *de presenti*; and the mortgagee takes the mortgage *cum onere*, for what it may ultimately be worth.

“An entire succession, disregarding the elements, which enter into its composition, is not an object susceptible of mortgage.” *Voorhies vs. DeBlanc*, 12 An. 864. *Held*: that the judgment against one of the heirs did not give him a judicial mortgage on the heir's share in the immovables of the succession.

“The widow in community can not, while the succession is still under administration, and before its debts are paid, and her residuary interest thus definitely ascertained, execute a valid mortgage on her undivided half of any specific property of the succession. * * * How can she pick out a particular piece of property, or several pieces, and, assuming that the sale of it, or them, will not be necessary to pay the debts, appropriate an undivided half to herself, and mortgage it as her own absolutely?” *Cestac vs. Florane*, 31 An. 493.

Such a mortgage “can have no effect beyond her actual interest determinable upon a settlement of the community.” *Palmer vs. Dickson*, 37 An. 915.

The judicial mortgage against Widow Schiller would certainly attach to any specific property allotted to her in the partition of the estate; but not otherwise.

In the partition of the succession no real estate was allotted to her, but her share was allotted by a payment of money and a remission of the debt due by her to the succession, which debt in reality amounted to more than double the rest of the assets, while her interest as an heir was only one-third of the succession.

The opinion of the court was delivered by

BREAUX, J. Plaintiff instituted this hypothecary action to enforce the payment of a judicial mortgage he claims on one undivided third of certain property in the possession of the defendant.

Plaintiff's judgments, amounting to three thousand dollars, were obtained in 1883, and duly recorded in May of that year.

In 1881 Mrs. J. B. Schiller, against whom these judgments were obtained, made a partition and partial settlement with her children,

Railroad Co. vs. Fairex

to whom she was indebted as tutrix; the act of partition shows the acquisition of the property on which plaintiff claims a judicial mortgage by Mary A. Schiller, wife of O. A. Fairex.

In 1881, after the partition and partial settlement, Mrs. O. A. Fairex brought suit against her mother for an account, and in default of an account for thirty thousand dollars and interest.

Judgment was pronounced in her favor for that amount, being, the judgment recites, proportion of rents and revenues of the community property held in common by defendant with her husband, John B. Schiller, and due to the plaintiff.

In August, 1884, Mrs. Mary E. Schiller bequeathed the undivided two-thirds of the property to O. A. Fairex, the disposable portion; and her mother, Mrs. J. B. Schiller, inherited the remaining one-third as forced heir.

The will included two-thirds of the judgment obtained by the testatrix against her mother in 1881.

The property, including the judgment, were inventoried in the succession of the testatrix.

In 1887 Mrs. J. B. Schiller brought suit to annul the will of her daughter, Mrs. O. A. Fairex, and one of the allegations was that the judgment obtained by her daughter against her was not real, though it existed in fact.

In 1888 Mrs. J. B. Schiller consented to a judgment maintaining her daughter's will, and transferred to O. A. Fairex her undivided one-third interest as forced heir in the property, on which plaintiff claims a judicial mortgage.

Fairex, the transferee, paid Mrs. J. B. Schiller and her two daughters, Mrs. Henley and Mrs. Rollings, the sum of thirty-five hundred dollars.

All three are parties to the act "to compound, compromise and adjust their differences upon the terms and in the manner" declared in the act.

O. A. Fairex, as instituted heir of his wife, Mary E. Schiller, in addition canceled and annulled the judgment of thirty thousand dollars obtained by his wife against her mother, Mrs. J. B. Schiller.

In the deed it is declared that the judgment is canceled by O. A. Fairex "in consideration of said above compromise."

Upon these facts judgment was rendered in favor of the plaintiff, condemning him to deliver the property or pay the amount.

From the judgment the third possessor prosecutes this appeal.

Two questions present themselves:

1. Does plaintiff's judgment affect the property of the defendant or secure a judicial mortgage?

2. Does it precede all claims in rank, and can the property be held subject to plaintiff's judicial mortgage without regard to any pre-existing indebtedness of Mrs. J. B. Schiller to the defendant which entered into the act of compromise of 1888 between her and Fairer?

THE JUDICIAL MORTGAGE.

In answering the first question our attention is arrested by the leading case of Voorhies vs. DeBlanc, 12 An. 864, cited by defendant's counsel, in which it was decided that an entire succession, disregarding the elements which enter into its composition, can not be mortgaged.

It is argued in behalf of the defendant that the debtor to plaintiff, Mrs. J. B. Schiller, did not acquire the specific property on which plaintiff claims a mortgage. That the mortgage did not attach for the reason that no settlement was made and no partition. That she could not have *dominium* over the property pending the administration. That the heirs inherited the succession as an entirety to be partitioned.

Such being defendant's appreciation of the facts, we are referred by his counsel to several decisions in line with the decision before mentioned as applying.

It would be going beyond what is called for by the facts in this case, to express an opinion regarding the principle announced in the Voorhies-DeBlanc decision.

In the case of Tureaux vs. Gex, Administrator, 21 An. 253, this Court said that the mortgage resulting from the recording of a judgment attaches to the heirs' portion of inherited immovable property, and that the enforcement of such mortgage is dependent upon the final settlement of the succession.

The Court adds: "Some doubt is created by the decision of the majority of the Court, but that a careful examination of the case will show that the point was not decided nor directly presented."

From Smith & McKenna vs. Charles, 27 An. 504, we quote:

"The recording of a judgment against an heir was held to affect all the mortgageable property thus owned by such heir."

We quote from these decisions to establish that it has never been held that the heir's portion is not affected by a mortgage against him. The conditions being that the enforcement of the mortgage is dependent upon a partition and final settlement of the succession.

In the case at bar the mortgage debtor was in possession of the undivided third of the lots inherited from her daughter, and there was in effect a partition, a final settlement of the act of compromise; but it did not remain as intended by the parties.

She transferred a third of the property to the co-proprietor, the instituted heir.

The contention of the purchaser, Fairer, at this time, is that it never passed out of the succession of the testator.

This position is not tenable, for he has acknowledged in a notarial act of transfer that Mrs. Schiller was in possession, and that she owned the property he acquired from her. The defendant having acknowledged that she had the right to sell, the legal sequence is obvious that the judicial mortgage attached.

The power to alienate included the power to mortgage.

The case is at least one remove from the DeBlanc-Voorhies case and other decisions *in pari materia* in which the issue related to property that had not passed from the succession to each heir *in proprio nomine*, but had remained unsettled as an entire succession. In the case under consideration the property had passed to the heir with the consent of the instituted heir and co-owner, who bought from the debtor, Mrs. J. B. Schiller.

The property is, beyond all question, in his possession as owner.

Such being the fact, he is without right to have it considered as in the possession of the succession of his late wife and never to have been in possession of her mother, as owner and heir, from whom he acquired.

As plaintiff's judicial mortgage attached, it devolves upon us to pass upon the second point involved, and suggested by the question relating to the indebtedness of Mrs. Schiller to her daughter, and its effect upon plaintiff's claim.

She was, it is contended by defendant, a debtor in a large amount, and in consequence not entitled to any portion of the estate.

Further, that after the settlement of the amount due she would have remained indebted to the succession; that her creditor, the

plaintiff, could not acquire any right upon the property before a settlement had been made.

In answer to this contention of the defendant, the plaintiff argues that she sold her undivided third interest to the property to the third possessor, Fairex, and thereby rendered it impossible to make a settlement.

The compromise was made between plaintiff's debtor and the third possessor on the basis of an alleged indebtedness of the former to the latter, amounting, they declared, to thirty thousand dollars, for revenues and collections and a cash consideration.

The judicial mortgage creditor should not thereby gain an advantage, nor should its interest as a mortgage creditor be thereby prejudiced.

Plaintiff can have no better right in the property than his debtor, unless he can show some fraud or collusion by which his rights have been impaired.

It seems to us that the encumbrance on the property should be established by reference to the condition existing at the date of the transfer.

That the act of compromise and settlement does not extinguish pre-existing rights to the benefit of the judicial mortgage creditor, unless it contains declaration to that end of such a character that it is absolutely binding forever.

If there was an amount due by Mrs. J. B. Schiller, it was an amount for which her interest in the estate of her daughter was accountable. The two claims—that of the succession as a creditor and that of Mrs. Schiller, as a forced heir of her daughter, were subject to adjustment and settlement in the process of settlement of the latter's succession.

The mortgage of plaintiff could attach only to the *residuum* after settlement.

The act intended as a compromise effected the settlement of the succession by a showing between the parties that Mrs. Schiller, because of her indebtedness to the succession, had no interest in the property, save possibly as to the amount cash paid to her by the instituted heir, Fairex.

If the compromise is not of binding effect, as to the claims of third persons, and does not protect the defendant against plaintiff's judi-

Railroad Co. vs. Faïrex.

cial mortgage, the condition prior to the compromise should be restored.

As to that portion of the thirty-five hundred dollars paid to her as an additional consideration for the compromise. There is an appearance of additional value of Mrs. Schiller's interest in the property inherited by her over and above her indebtedness.

If there was an additional value fixed by defendant, it may be that the mortgage of plaintiff to that extent attached to the property.

As the case must be remanded for another trial, we formulate our first impressions on this point—that is, regarding the effect of the cash paid as an additional consideration, and leave that particular question open for future determination.

JUDGMENT BY CONSENT.

The plaintiff contends that the judgment of thirty thousand was a consent judgment.

We do not think that we are authorized, in these proceedings, in which the judgment is not attacked, to pass upon its validity and decree that it has no binding force.

On the face of the papers it does not appear that it was a consent judgment, and that it was without consideration. It was treated in different transactions as a judgment having consideration, except in a petition in which the judgment debtor alleged that it was without consideration.

The declaration, unconnected and of itself, does not affect whatever right the judgment creditor had.

The rights of both, plaintiff and the third possessor, are reserved—the former to attack and the latter to present all legal pleas in defence.

PRESCRIPTION.

The plaintiff, as an additional ground against the judgment of defendant against Mrs. Schiller, pleads the prescription of ten years.

The ten years had not elapsed at the date of the compromise in 1888.

With reference exclusively to prescription *vel non*.

We think that the judgment having entered into the compromise, entered into to settle the rights of the parties, that it escapes from the effects of the plea during the suspension which follows the compromise; that if not settled as intended, it was not subject to the plea.

Railroad Co. vs. Fairrex.

That question, in so far as relates to re-inscription, was passed upon and determined in the case of New Orleans Insurance Association vs. Lebranche *et al.*, 31 An. 844.

Interpreting Art. 3409 of the Civil Code, Justice White, for the Court said: "The servitudes and incorporeal rights which the third possessor holds on the property before his possession of it are revived after his relinquishment, or after the sale under execution made upon him.

"Under this unambiguous provision were Montegut evicted by the benevolence of the law-maker would come the *restitutio ad integrum*.

"The annulment or rescission of the sale would have the effect of placing the parties in the position they held before the sale, each party being restored to the rights he then had, and abandoning those which had ineffectually been transported to him," and citing Larombiere, Vol. 2, p. 286, and Solon, Vol. 1, p. 62, in support.

"These principles are the outcome of natural justice, and are dictated by the wise motive that courts may not be made the instruments of injustice by lending their aid to enrich one man at the expense of another."

Particularly with reference to re-inscription the Court in that case holds: "We can not take one provision of the law, that which dictates re-inscription, and abandon every other. * * *

"The rights being fixed, the reason for inscription ceases. It would be indeed an inequitable system which would allow a creditor, whose rights against the proceeds would entitle him to nothing, to lie in wait for the unsuspecting owner and, when the useful time for re-inscription had passed, take by way of action in nullity that which he could not have attained by the timely assertion of his rights."

It is therefore ordered, adjudged and decreed that the judgment appealed from be and it is hereby annulled, avoided and reversed.

That plaintiff's mortgage, resulting from the recording of the judgment against the forced heir, Mrs. Schiller, attaches to her portion subject to prior debts.

That the amount of the indebtedness of Mrs. J. B. Schiller to the succession of her daughter, Mary E. Schiller, be ascertained and fixed.

That the residuum be legally established, if any, by reference to her indebtedness and by required proceedings.

Of the thirty-five hundred dollars cash, in compromise of 1888,

 State vs. Slaughterhouse and Refrigerating Co.

the amount paid by O. A. Fairex to Mrs. J. B. Schiller, and whatever effect that payment may have on the value of the residuum is reserved for future decision.

That the case be remanded, to be tried in accordance with the views herein expressed.

The rights of the parties to amend their pleadings, so as to set forth all their claims and pleas, are reserved.

That appellee pay costs of appeal.

ON APPLICATION FOR A REHEARING.

BREAUX, J. In his application for a rehearing the defendant and appellant asks that certain rights be reserved, or, in the alternative, that a rehearing be granted.

We can not conceive that any further reservation need be made, or that a rehearing should be granted.

We have decided that plaintiff's recorded judgment against the heir, Mrs. J. B. Schiller, affected the mortgageable property to the extent of the *residuum*.

We certainly have not prejudged any issue which will be in the way in ascertaining whether or no there is a *residuum*.

Her rights and her liabilities as an heir and as a debtor to her daughter's succession must be established; all indebtedness proved and chargeable must be charged.

No point passed upon increases or lessens those rights or liabilities.

They are absolutely unaffected by our decree.

Rehearing refused.

No. 11,559.

THE STATE OF LOUISIANA VS. THE PEOPLE'S SLAUGHTERHOUSE AND
REFRIGERATING COMPANY.

46	1031
50	1371
50	1372

An act providing for the appointment by the Governor of an inspector, with power under the supervision of the Board of Health to inspect throughout the State animals intended to be slaughtered for human food and providing for his fees, is not in conflict with Art. 46 of the Constitution, because the act professes to amend a legislative act embodying the charter of a corporation—the proposed amendment being immaterial and the act assailed being valid if the proposed amendment is stricken out.

State vs. Slaughterhouse and Refrigerating Co.

Nor will such act relating altogether to the inspection of animals intended for human food be deemed to include more than one subject in violation of Art. 29 of the Constitution, because it professes to amend a prior act on the subject of inspection, the act assailed being entirely sufficient to effect its object if the proposed amendment had not been inserted.

The title to charge the Board of Health with the supervision of the inspection of stock to be slaughtered for human food covers the appointment of an inspector of such stock and the provision for his fees.

Nor does such an act for the inspection of stock throughout the State require previous notice under Art. 48 of the Constitution.

The authority conferred by Art. 248 of the Constitution of the State on municipal corporations and parishes, to regulate within their limits the slaughtering of animals for human food, does not strip the State of the police power to provide for the appointment of an inspector of all such animals slaughtered throughout the State, such inspection to be under the supervision of the Board of Health. *Cooley on Constitutional Limitations*, Chapter 16, "Police Power;" *The Slaughter House Case*, 16 Wallace, 86; *The Beer Case*, 97 U. S. 25.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

M. J. Cunningham, Attorney General, for the State.

Farrar, Jonas & Kruttschnitt Attorneys for Charity Hospital, Appellants:

Act No. 87 of 1888 is a valid inspection law. The Slaughterhouse Charter was based on the police power of the State, and, being an exercise of the police power, it was not a contract, and the Legislature could at any time repeal or amend any part of the charter. The fact that part of a title is unconstitutional does not make the whole law unconstitutional. *State vs. Exinicious*, 33 An. 253; *State vs. Crowley*, 33 An. 782; *Williams vs. Lodge of Masons*, 38 An. 620.

There is no distinction between this case and the auctioneer's fee or percentage on sales, which is directed to be paid to the Charity Hospital, which this Court has affirmed in numerous decisions. *State vs. Girardey*, 34 An. 620; *Board of Administrators vs. Girardey*, 36 An. 605; *Boye vs. Girardey*, 28 An. 713; *Wintz vs. Girardey*, 31 An. 381.

J. R. Beckwith for Defendants and Appellees.

The opinion of the court was delivered by

MILLER, J. This is an appeal from the judgment of the Civil District Court against the State on its petition for an injunction to restrain defendant from slaughtering animals for human food, until inspected by the State Inspector and the inspection, fees paid as directed by the act of the Legislature No. 87 of 1888.

The defence was, besides the exception of no cause of action, that the act of 1888 is unconstitutional because violative of Arts. 29, 43, 46, 48 and 248 of the State Constitution. The argument in this Court in behalf of defendant is mainly directed to the asserted repugnancy of the act to Art. 248.

The prohibition in Art. 46 is against amending charters of corporations. The act of 1888 does, in its title, express the purpose to amend the Act 118 of 1869, which, besides creating the Crescent City Live Stock Landing and Slaughterhouse Company, was "an act to protect the health of the city of New Orleans," and in its sixth section provided for the appointment by the Governor of an Inspector of Animals intended to be slaughtered for human food. The sixth section in no sense formed part of the charter of the Crescent City Company, though that company was subjected to its operations. It is this sixth section the act of 1888 proposes to amend, and the change is to extend the inspection of animals to be slaughtered, place the inspection under the supervision of the Board of Health, impose certain additional duties on the Inspector, especially with respect to the cleanliness of the slaughterhouse, and change the disposition of inspection fees. An amendment of this section is not an amendment within the purview of the forty-sixth article. It would be a valid enactment if the title of the act of 1888 made no reference to the act of 1869, and hence can not be assailed because the title of the act of 1888 refers to the act of 1869.

We group, for consideration, the objections to the act of 1888 based on Art. 29, to-wit: that the title to the act does not express its object, and that the act embraces more than one object. The purpose of the act was, as already stated, to enlarge the duties of the Inspector of Live Stock so as to extend to all animals slaughtered for human food in all slaughterhouses, and place inspectors under the supervision of the health officers, and to make other changes incident to inspection already stated. From first to last the act deals only with inspection of animals and the supervision under which it

State vs. Slaughterhouse and Refrigerating Co.

is to be conducted. The provisions with respect to fees and their disposition, and other details, are all germane to the subject of inspection, and the reference to the act of 1869 introduces no new subject, and for all practical purposes might as well be omitted. Viewing the act as not covering two objects, and holding that the substantial purpose is fairly covered by the title to charge the Board of Health with the supervision of all stock to be slaughtered, the appointment of the Inspector and his fees being incident to that supervision, we hold there is no repugnancy of the act of 1888 to Arts. 48, 29, 43 and 248 of the Constitution. The title of the act is certainly broad enough to cover the appointment of the Inspector, and that appointment is all that this suit involves. We are safe in holding the title sufficient for that purpose. The second and fifth exceptions, that the act attempts to appropriate public money that should go into the treasury, and that the act was local and required notice, we think hardly deserve serious consideration. An act looking to the inspection of all live stock to be slaughtered anywhere in the State, and providing for the inspection commensurate with the scope of the act, can hardly be deemed local. Money derived from taxes and licenses, *i. e.*, the ordinary revenues of the State, can be taken out of the treasury only by legislative appropriations. But fees required to be paid in aid of inspection or health laws are manifestly within the scope of Art. 46 of the Constitution. The remaining exception is that Art. 248 of the Constitution of the State strips the Legislature of all police power with respect to the inspection of animals to be slaughtered for human food. That power, it will be conceded, extends to all the incidents of the subject within its scope. It will doubtless occur that the powers with respect to some of those incidents may well be exerted to the full extent required by the municipalities and parishes. But it is not easy to conceive that with reference to other incidents within the police power, the municipalities and parishes could exert the functions required. Thus, if legislation is required to act on the subject generally and to be effective throughout the State, so as to bring the subject within the operation of a uniform rule, such rule would have to be prescribed by the State, the authority of towns, cities and parishes being limited by their territorial jurisdiction. An inspection law to operate on animals intended to furnish human food from the time

the animal is introduced, and to apply wherever it is carried within the State, would, from the very nature of such a law, require State authority for its enforcement. It is not, therefore, reasonable to hold that it was ever intended by the Constitution to deprive the State of all competency for such general legislation. All canons of interpretation are against the presumption of the relinquishment of the police power existing in the State (Cooley's Cons. Lim., Chap. 16; the Slaughterhouse Case, 16th Wall. 36, *passim*). The 248th article of the Constitution delegates to the parishes and municipalities the regulation of the slaughtering of animals within their respective limits. It would be, we think, giving to the "regulating" a significance far beyond the import of the word if we were to hold that the State was thereby deprived of all power to pass an inspection law to operate throughout the State on animals before they can be slaughtered. This court has held in cases simply involving the location of slaughterhouses in this parish, that this power to prescribe the location was in the local authorities under the article of the Constitution. The court in reaching that conclusion used some general language with respect to the supposed divestiture of the State of its police power under the Art. 248. All that the determination of the cases required was the adjudication that the location of slaughterhouses was in the parish or municipal authorities. Any reasoning of the court in those cases is of course controlled by the single point at issue, i. e. the location of slaughterhouses (Villavaso vs. Barthet, 39 An. 247; Darcantel vs. Slaughterhouse Company, 44 An. 632). The act, of 1888, in question here provides for the appointment of an inspector to act under the supervision of the Board of Health to inspect all animals slaughtered for food in the slaughterhouses here and in all other slaughterhouses within the State. The validity of such an act was in no manner involved in the previous decisions of this Court. In so far as the act provides for the inspector and his fees, it was the exercise of the general police power left in the State untouched by Art. 248, delegating the police power only to a limited extent to the municipalities and parishes. The injunction in this case is to prohibit the slaughtering or permitting the slaughtering of animals in defendant's slaughterhouses until the animals are inspected and the inspector's fees paid. To that extent we are clear the act is valid. The defendant is without interest with respect to the fees, and if there are other questions

Succession of Lanaux.

beyond that presented by the application for the injunction, it will be time enough to meet them when they arise. We have given the case, we believe, all the consideration it requires. The parties are anxious for a speedy decision, and, submitted as the case has been, at the close of the term, we have not been able to elaborate the opinion, but have presented sufficiently, we trust, the ground of our decree.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided, annulled and reversed; and it is further ordered, adjudged and decreed that the defendants be enjoined and restrained from slaughtering or permitting to be slaughtered in their slaughterhouse any animal intended to be slaughtered for human food until the same is inspected by the State Inspector and his fees paid, as directed by the legislative Act No. 87 of 1888, and that defendants pay costs.

No. 11,356.

SUCCESSION OF PIERRE LANAUX.

A debtor who deposits with a third party pledges for his creditor, presumably purchased with trust funds, and who informs the creditor of the deposit, who accepts the third party as the depositary, loses control and possession of said pledge. The depositary holds the pledge for the benefit of the pledgee. That the third party is the clerk of the pledgor does not destroy the effect of the pledge.

A depositor of money lost or misappropriated by an insolvent depositary does not give the depositor a general privilege on the estate of the depositary for the return of the money.

ON APPLICATION FOR REHEARING.

Delivery of the property pledged to the creditor, or to the third person to hold possession for the creditor, is indispensable to perfect the contract of pledge, and when delivered to the third person he must, of course, know of the trust and accept the obligation it imposes. Civil Code, Arts. 3133, 3152, 3162; Code Napoleon, Art. 2076; Laurent Droit Civil, 28th Vol., p. 162, pars. 464, 470, 471, 494, 3d Mourlin Examen du Code Napoleon, p. 482, par. 1218, Sec. 3; 7th Boileux Commentaire du Gage, p. 129; Jones on Pledges, Secs. 23, 27, 28, *et seq.*

Hence, no pledge is accomplished by the debtor executing his note in favor of his creditor, attaching bonds and certificates of stock to secure its payment, placing note and securities in a package marked with the creditor's name in the box of the debtor in bank, the debtor at the same time instructing his clerk having the key of the bank box to deliver the package on the request of the creditor; and although the instructions are communicated to the creditor, and all is done in pursuance of a pledge promised the creditor, but no delivery ever having been made, and when the debtor dies the securities remaining in his bank box deposited and held as his property. *Ibid.*

 Succession of Lanaux.

In such case, the clerk of the debtor, because he receives the instructions of his employer to deliver the securities, and communicates such instructions to the creditor, does not become "the third person agreed upon" to take possession of the securities for the creditor, required by the Code when the pledge is proposed to be perfected by that method of delivery; least of all can we hold that by such instructions and their communication is any shadow of possession passed to the clerk of securities in his employer's bank box, never taken from it until his death, when his executor takes charge of box and contents. *Ibid.*

Instructions of an employer to his clerk, with reference to the delivery of the employer's securities to one of his creditors, and communicated to the creditor, whatever their force in the life of the employer, certainly cease to have any effect when the death of the employer occurs, no delivery having ever been made.

Death of the debtor fixes the rights of his debtors as they exist at that moment, and a proposed pledge, not perfected by delivery when the debtor's death occurs, confers no rights. 1 H. D., p. 686, Insolvency IV, No. 7; 2 H. D., p. 1504, *i. e.*, Delivery; C. C. 3133, 3152, 3162, 3182, 3183, 3185; 12 Rob., p. 243, and authorities cited on page 1053.

A PPEAL from the Civil District Court, Parish of Orleans. *King, J.*

Chas. F. Claiborne Attorney for the Testamentary Executor, Appellant:

This is a contest over an account of distribution presented by the executor of this succession.

Among the principal creditors of this succession are Widow F. E. Tassin, Denis Lanaux, Joseph R. Hymel, and the heirs of Seraphin Hymel and of Octave Hymel. They had been placed upon said account as privileged creditors whose claims were secured by pledge of stocks and notes. Their right to a pledge and preference was opposed by several creditors. The court below denied their privilege. From this judgment they have appealed.

Authority to sign a promissory note may be by parol. C. C. 2997 (2966); 21 An. 477; 8 R. 242; 23 An. 310; 6 La. 587; 1 Daniel Neg. Inst., Sec. 274; 1 Parsons on Bills, p. 100; 34 An. 224.

A pledge of notes, stocks and bonds may be by parol; and the power to execute the same may also be by parol. C. C. 3158, Sec. 2; 35 An. 1173; 43 An. 1051.

Because parties have committed to writing an act which would have been valid by parol, it does not follow that authority to do the act must be in writing.

Succession of Lanaux.

A principal who has a balance in the hands of his agent has neither preference nor privilege upon the money in the hands of his agent, unless he can identify it as his own. 9 La. 50; 17 La. 162; 25 An. 478; 31 An. 314.

T. J. Semmes & Legendre Attorneys for Estate of Seraphin Hymel, Appellant:

Art. 3152, C. C., is modified by Art. 3162. The pledgee need not always have corporeal manual possession of the thing pledged; a third person may be detainer of it by agreement between the parties, and even the pledgor may have possession of the thing pledged for account of the pledgee. 38 An. 863; 33 An. 973; 32 An. 1250; 42 An. 694.

The tradition or delivery of movable effects takes place either by real tradition or by the delivery of the keys of the buildings in which they are kept. C. C. 2478. This rule of delivery has likewise been recognized by the courts in France: "La deliverance des effets s'opere par la remise des chefs des batiments qui les contiennent." Duranton, T. XVIII, p. 607, No. 521; Dalloz Nantissement, No. 211, Art. 21, February, 1840; Dalloz, 1876, 2-23; Bordeaux, 26 May, 1873.

The rule exists at common law as well as under the civil law. 1 Atk. 165, 171; Ryal vs. Rolle, 2 T. R. 462; Atkinson vs. Maling—Held, the delivery of the keys of a warehouse is a delivery of the goods that are in it.

The common law also recognizes the principle that possession may be held by a third person for the pledgee. 43 N. H. 430, Bruns vs. Warren; 18 N. H. 285, Tibbetts vs. Flanders; 3 Tenn. Ch. 13, McCready vs. Haslock; Jones on Pledges, Secs. 34, 35.

In *Courts vs. Tuchett*, 24 Minn. 423, it was held that a delivery of goods to a workman or clerk employed by the pledgor and possession by such workman on behalf of the pledgee are sufficient to create and continue the lien.

Under the jurisprudence of this State it is well settled that a factor stands in a fiduciary relation to his principal in respect to the proceeds of goods sold; *a fortiori*, does he stand in that position in respect to a special deposit, such as was made in this case. The legislation of this State has attached the quality of a trust to that relation, and has conferred upon it the responsibilities ensuing therefrom, and has affixed criminal penalties for its

Succession of Lanaux.

violation in Sec. 905 of the Revised Statutes. 25 An. 187, *Tate vs. Laforest et als.*; 28 An. 870, *Brown vs. Garrard*; 31 An. 809, *Desobry vs. Tete*.

The law does not require impossibilities. To require identification of the very bank notes deposited by Hymel with Lanaux, and by him deposited in bank, is to require an impossibility. Such extreme nicety of proof of identity is not required, and is in fact repudiated. The doctrine was fully considered in the following case: 104 U. S. 55, *National Bank vs. Insurance Company*. Same doctrine recognized in *McLeod vs. Evins*, 66 Wis. 401; 28 N. W. 173; *Bank vs. Weems*; 6 S. W. 802, and in the English courts—4 De Gex M. and G. Eng. Chan. Rep.; 13 Chancery Div. (Law Reports), *Knatchbull vs. Hallett*.

F. P. Poché and Albert Voorhies for Mrs. Tassin, Appellant.

Albert Voorhies for Jos. R. Hymel, individually, and as executor of succession of Octave Hymel, filed separate briefs.

The form and execution of the contract of pledge are distinct matters.

Delivery, which is of its essence, constitutes the execution.

The form is the language, written or spoken, evidencing the agreement or contract.

The vested right of the creditor-pledgee results from an adherence to the form, accompanied by the execution.

The law of delivery by pledgor, and of possession by pledgee, is identical in the Roman, French and Louisiana jurisprudence.

But the form, or formalities of the contract of pledge show chronological variances in the three systems respectively, and in each of these systems within itself.

Originally the general rule in each system was that pledge required in all cases a written (and in some instances an authentic) instrument, besides registry in some cases.

In Louisiana, originally, all pledges required a written instrument—some few an authentic act. But by various statutory amendments incorporated in Revised Civil Code of 1870, all pledges of incorporeal things can be made by verbal as well as written contract; while a private writing is all that is required for movables corporeal.

Succession of Lanoux.

E. Howard McCaleb and Beattie & Beattie Attorneys for the People's Bank of New Orleans, the New Orleans National Bank and George Dionni, Opponents and Appellees, filed a brief.

J. McConnell Attorney for State National Bank, Opponent and Appellee:

In this case no actual delivery was ever made by the pledgor to the pledgees. The pledgees were never put in possession, and no third person was agreed on by the parties who, as trustee *ad hoc*, or otherwise, received actual possession, and remained in possession, for the alleged pledgees as required by law. C. C., Art. 3162 (3129); C. N. 2076; Code of 1808, p. 446, Art. 7; *Jacquet vs. His Creditors*, 38 An. 866; *Conger, Exr., vs. City of New Orleans*, 32 An. 1252; *Weems vs. Delta Moss Co.*, 33 An. 973; *Succession of D'Meza*, 26 An. 35; *Casey vs. Cavaroc*, 96 U. S. 475.

Where the pledgee's possession is not in himself, but in a third person, such third person (a) must have been "agreed on by the parties"—*i. e.*, by both pledgor and pledgee, and (b) such third person must have been "actually put and remained in possession" of the pledged property, otherwise no privilege thereon can exist as against third persons. C. C., Art. 3162, and authorities above quoted.

No promise to transfer or deliver collaterals as security for a debt can create a privilege upon the collaterals not actually transferred. *Succession of D'Meza*, 26 An. 35, quoted and approved in *Casey vs. Cavaroc*, 96 U. S., 485, 486.

If the dispossession of the pledgor is not sufficiently complete to prevent substitution the pledge is not valid. *Dalloz Nantissement*, 119; *Casey vs. Cavaroc*, 96 U. S., 476.

If the pledged property remains in the possession or under the control of the pledgor (as in this case), the pledge is void as against third persons, unless such possession or control of the pledgor is proved to be precarious, or clearly for account of the pledgees. *Jacquet vs. His Creditors*, 38 An. at p. 866; *Conger, Exr., vs. City of New Orleans*, 32 An. 1252.

"The property of the debtor (especially insolvent debtors) is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist

Succession of Lanaux.

among the creditors some lawful cause of preference." O. C. 3183 (3150). "*Privilegia sunt strictissimæ interpretationis.*" Privileges, especially when asserted against third persons, must be "conclusively established." 10 An. 429. "Privileges are never allowed except when expressly granted by law; and then only by virtue of an exact compliance with the legal requisites essential to their creation and existence." Hennen's Dig., p. 1238, No. 3, and authorities there cited.

When pledged securities are "actually put" in the possession of a custodian selected by the pledgor alone, and are held by such custodian, subject to the orders and control of the pledgor, and the property so remains subject to the control of the pledgor until his death, such pledge is without effect and void as against third persons.

Farrar, Jonas & Kruttschnitt, W. S. Benedict, R. G. Dugué and John B. Fisher Attorneys for other Appellees.

The opinion of the court was delivered by

McENERY, J. Pierre Lanaux, commission merchant and factor, died in the city of New Orleans, September 6, 1892. He was the agent for Mrs. E. Tassin, Octave Hymel, deceased, and J. R. and Seraphin Hymel. These parties entrusted their funds to Lanaux for investment without specifying and directing the mode of investment. These funds were never, except in case of Mrs. Tassin, loaned to Lanaux, and he was never authorized to use them for his own purposes or in his business. The mandate, as shown by the witnesses and the correspondence between the parties, was to invest their funds. They were deposited by them with Lanaux for this purpose and none other. On the accounts current furnished these several parties, it was noted that the funds had been invested without saying in what particular manner.

A short time before his death, Lanaux, for the amounts which he had for investment for these parties, made up separate packages in separate envelopes in which were placed his individual notes for the amount due each, with bonds and certificates of stock, with the usual blank power of attorney to transfer, attached to them.

On each envelope or package was endorsed the name of the party

Succession of Lanaux.

to whom it belonged. They were placed in a bank box, and this box with the key was placed in the actual, corporeal possession of DeJahan, his clerk.

This box was, according to Lanaux' instructions, placed in the branch depository of the State National Bank for security and safe keeping, through the intervention of G. A. Lanaux, who received the box from DeJahan. DeJahan was instructed and directed by Lanaux, to deliver on demand these packages to the persons to whom they were addressed.

He had exclusive control of the box containing these pledges and says he would have delivered them to the parties on demand. It is evident, from the testimony of DeJahan and G. A. Lanaux, that DeJahan's possession of the box was full and complete, and adverse to that of Lanaux.

Mrs. Tassin, who had instructed Lanaux in the same manner as the Hymels, as to the investment of her money, subsequently met Lanaux, to whom she loaned her money on the faith of the securities set apart for her, with the understanding that DeJahan was to be the depository of the pledge. DeJahan after receiving these packages, informed Mrs. Tassin of his possession of the same for her benefit, and she accepted DeJahan as the depository then, as she had previously signified her assent to do so, when she had the conversation with Lanaux, which resulted in the loaning of the money. This statement of the facts in relation to Mrs. Tassin brings her case directly under the textual provisions of Art. 3162 of the Civil Code and the interpretation placed upon the same by this Court. 42 An. 694; 38 An. 863; 33 An. 973; 32 An. 1250.

The fact that DeJahan was the clerk of Lanaux could not affect his capacity to act as a third party, chosen by the parties, to be the detainer of the thing pledged. There was no inconsistency in the two relations. Having accepted the trust, so far as it was concerned, he was a stranger to Lanaux, and in no way bound by his private relation to him to violate his obligation as a fiduciary and to surrender the pledge to him. And he so regarded it, as he says he would have delivered the packages on demand to the parties for whom they were intended.

Seraphin Hymel, J. R. Hymel and Octave Hymel were informed of the investment of their funds, either by Lanaux or DeJahan, although the testimony does not show that they were informed par-

Succession of Lanaux.

ticularly as to the mode of investment. It is a fair inference, however, that they were so informed by Lanaux and DeJahan when they spoke to those parties, whom they had visited for the purpose of informing them as to the fulfilment of the trust imposed by them upon Lanaux. This is corroborated by the blank power of attorney which Seraphin Hymel refused to sign, the object of which was to remove and to deposit bonds, bills, stocks, notes, etc.

Taking all the evidence together, the impression made upon the mind is that the Hymels had knowledge of the pledging of these bonds, stocks, etc., for them, and that they accepted DeJahan as the custodian.

Seraphin Hymel's reason for refusing to sign the power of attorney was that he thought his funds safely invested.

The power of attorney was admitted in evidence over the objection of opponents, but it was admissible to show in part that Seraphin Hymel knew that his funds had been invested in the manner shown by the inventory and the account and the disposition of his funds, and that he accepted DeJahan as the third party agreed on between the parties to detain the pledge.

We see no good reason why the debtor can not place the thing pledged in the hands of a third party and inform the creditor of the fact, when, if he accepts the third party, the pledge becomes perfected. Such seems to be the doctrine indicated in *Peters vs. Pacific Guano Co.*, 42 An. 694.

The succession of Lanaux could have no greater rights than the decedent. If he had lived would not the pledgees have had the right to claim the things pledged to them in the hands of DeJahan? If a demand had been made upon DeJahan for the pledges he could not have set up title in Lanaux, and Lanaux certainly was estopped from claiming the pledges.

In fact he had completely divested himself of possession of the notes, bonds and certificates of stock after DeJahan had accepted the pledges from him and had been accepted as the detainer of the pledges by the pledgees.

Any attempt of Lanaux to dispose of the things pledged in the hands of DeJahan could have been successfully resisted by the pledgees. Another view of the case is also fatal to the demand of opponents.

Conceding that there was no valid pledge of the property, the relations between Lanaux and the Hymels were not those of debtor

Succession of Lanaux.

and creditor. They never authorized Lanaux to use for his own purpose or in his business these funds. Their instructions to him, who was their servant and agent, were to invest their funds. They were informed that they had been invested, and it was so noted in the account current furnished the Hymels. Lanaux invested these funds in property, of which he was the owner, and placed the same in the hands of his clerk to be delivered on demand. The Hymels, on his death, found in his succession this property detained by Lanaux for them. This property was presumably purchased with their funds and separated from Lanaux' property, and became their property. *Beaty vs. McLeod*, 11 An. 76.

It is the law that the Hymels, in order to secure the identical fund in the insolvent succession, must separate the fund from the mass of the succession and distinguish it. But it is also the law when trust funds have been specifically invested in property which can be identified the property must respond to the trust fund and stand in its stead. The Hymels therefore have the right to claim the specific property purchased with their funds by their servant and agent. *Id.*

It is contended by opponents that the notes were null and void because signed and endorsed by DeJahan, and that he had no written authority to sign and endorse them. The mandate to sign and endorse a promissory note must be express and special, but it need not be in writing. 21 An. 476.

DeJahan's authority to sign and endorse the notes was express and special, although not in writing.

To perfect the pledge the delivery of the bonds, notes, etc., was sufficient. 35 An. 1171; C. C. 2158.

On October 8, 1891, S. Hymel deposited with Lanaux twenty-three thousand dollars. This deposit was for the purpose of meeting current expenses of his plantation. This sum is placed on the account as an ordinary debt. It is claimed by Hymel that this was a trust fund, and that the executor must turn it over to Hymel's representatives before making a distribution of Lanaux' assets among his creditors.

The fund has not been identified, nor has it been traced in its conversion into other property.

The depositor has no general privilege on the property of the agent. 25 An. 478; 31 An. 314.

Succession of Lanaux.

It must therefore be rated as an ordinary debt against the succession fund.

The opposition to the claim of the Planters' Fertilizing Company is not well founded. The proof is sufficient to sustain the claim. The District Judge was of this opinion and we see no reason to disturb his ruling.

Walton & Co. and Moran & Wood's claim for a privilege for coal furnished the plantation was properly allowed, restricted as it was to coal furnished for making the crop of sugar on the several plantations.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended so as to reverse that part of the decree sustaining the oppositions to the claims of Seraphin Hymel, Octave Hymel, Joseph R. Hymel, Mrs. F. E. Tassin, to be paid by preference and privilege out of certain notes and bonds, shares of stock, etc., pledged to them and mentioned in the inventory and on the account of the executor, and it is now ordered that the opposition to the same be dismissed and said claims be recognized as placed in the account. In all other respects the judgment is affirmed, the succession to pay all costs.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

MILLER, J. The question in this case is whether the appellants, the Successions of Seraphin Hymel, of Octave Hymel, Joseph R. Hymel, Mrs. Florian E. Tassin and Denis Lanaux, are pledge creditors of the late Pierre Lanaux. The account of the executor of the deceased recognized the pledges, and from the judgment of the lower court maintaining the oppositions of ordinary creditors of the deceased, and adjudging that the appellants were not pledge creditors, they prosecute this appeal. The case has been elaborately argued in the court, both on the original trial and on the rehearing, and has engaged our serious attention.

The full argument in this court has served to eliminate from consideration a mass of testimony contained in the voluminous record, well calculated to cloud the issue and mislead the court. At the outset, it may be stated, we regard the debts of the creditors asserting the pledges as established. The pecuniary condition of Pierre Lanaux is unimportant, as this is not the revocatory action. It is no

Succession of Lanaux.

consequence in this discussion that Pierre Lanaux, the deceased factor, had annually for years balances in his hands derived from the sale of the crops of the asserted pledge creditors; was accustomed to invest for them their balances, and all evidence tending to show that the asserted pledges were such investments, has no bearing on the controversy, the creditors claiming as pledgees, not as owners, for whom the securities had been bought by their agent. The claim of ownership, and at the same time as creditors, entitled to the bonds as pledgees would be inconsistent, besides admitting of no support under the facts, and the creditors properly elected in the lower court to stand on their asserted pledges.

The controversy is between the creditors asserting these pledges on a large amount of the securities of the debtor, and the mass of his creditors interested in disputing the pledges, so as to secure the application of all the debtor's assets to the payment of his debts. The requisites of the pledge are well defined. The agreement consummated by delivery of the property pledged to the creditor, or the possession of the property by a third person, agreed on to hold for the creditor, are the essentials. There is no substantial difference between our Code and the general commercial law on the subject, and in one of the recent text books the articles of our Code are incorporated as expressing the commercial law. In this case there is no pretence of any delivery to the creditors. The claim of the asserted pledge creditors is the securities were placed in the possession of a third person to hold for them. Civil Code, Arts. 3133, 3152, 3162; Code Napoleon, Art. 2076; Jones on Pledges, Secs. 23, 27, 28, *et seq.*; Laurent Droit Civile, 28th Vol., p. 162, pars. 464, 470, 471, 484; 7 Boilleux Commentaire du Gage, p. 129.

The pledges are asserted to have been made in August, 1892. Pierre Lanaux, the debtor, died in September, about a month after. There was no intercourse between the debtor and Denis Lanaux, one of the alleged pledge creditors, having any reference to the pledge claimed for him. We draw the conclusion from the record that there was none with Seraphin Hymel, another alleged pledge creditor, leaving out of view the hearsay testimony of statements from him that his balance in the hands of the deceased factor was safe, or had been invested. With two others of the creditors claiming privilege, Octave Hymel and Joseph R. Hymel, there appears to have been intercourse prior to the time of the asserted pledges,

Succession of Lanaux.

from which these creditors derived the understanding, or were assured by the deceased factor, their balances in his hands would be or were invested, and their securities placed in the safe of the New Orleans Insurance Company, in the vault of the branch depository of the State National Bank in this city. The deceased factor was president of both institutions. With Mrs. Tassin, another of these creditors, the communications of the deceased factor were of a more special character. Her balance in his hands in July, 1892, was large, and she was solicitous to have it secured, i. e. invested in State bonds. He submitted to her his plan thus: He would make his note for forty thousand dollars, secure it by a pledge of State bonds and other securities, place note and securities in the hands of George DeJahan, his clerk, instruct him to put the note and securities in a bank box, in the safe of the New Orleans Insurance Company, in the vault of the branch bank, to which George Lanaux, the secretary, had sole access; at the same time he would instruct him to hold the box subject to the order of DeJahan, having the key of the box, and who would be directed to deliver the note and securities on her request. To this plan Mrs. Tassin assented.

With this review of the relations and intercourse of the deceased factor with his creditors, the next phase of this controversy is the method of execution of the asserted pledges. On the 3d of August, 1892, Mr. Lanaux directed his clerk, Mr. DeJahan, to make five notes; one for Mrs. Tassin for her balance of forty thousand dollars, one for thirty-one thousand dollars in favor of Octave Hymel, one for twenty-seven thousand five hundred dollars in favor of Seraphin Hymel, one in favor of J. R. Hymel for twenty-five thousand dollars, and another for ten thousand dollars in favor of Denis Lanaux; to attach to each note securities deemed adequate to secure it; to place notes and securities in five packages, each marked the property of the creditor for whom the contents were intended, and to put the sealed packages in a bank box, for which, Pierre Lanaux told his clerk, George Lanaux would call. All this was done, and DeJahan, the clerk, was instructed to deliver the packages to the creditors. On the day previous, George Lanaux had been requested by Pierre Lanaux to put a bank box in the safe of the insurance company, adding that DeJahan would give the box. On the day following the making up of the packages and placing them in the box, it was taken from Pierre Lanaux' office by DeJahan and

Succession of Lanaux.

George Lanaux, and deposited in the safe of the insurance company, in the vault of the branch bank. DeJahan had the key of the box, George Lanaux the combination to open the safe. Nothing was said by Pierre Lanaux, or by DeJahan, to George Lanaux in reference to the box, save the request from Pierre Lanaux to deposit it, and, of course, there was no syllable of reference to its contents. It bore the name of the deceased factor, and contained, besides the packages, his will appointing Denis Lanaux his executor. Not a single security was ever delivered from the box. It was untouched from the time it was placed in the safe at Pierre Lanaux' request until his death, when it was opened under the order of the court to search for his will and inventory his property.

The claim of the creditors asserting pledges on the contents of the box, on the theory that the securities in their debtor's bank box are to be deemed not in his possession, but in that of these creditors through a third person supposed to hold for them, is fortified, it is urged, by the directions of Pierre Lanaux to his clerk to deliver the packages, and by the fact that the directions at the request of Pierre Lanaux were communicated by his clerk to the creditors or some of them. The testimony on this branch of the case appears to be about this: the information was given to Octave Hymel and Joseph R. Hymel that their funds in the hands of the deceased factor had been invested for them, were in the safe of the insurance company, and, to use the language of the witness, they ratified the investments. The testimony of DeJahan on this point is in some degree conflicting, apt to occur in the testimony of any witness subjected to protracted examination and cross-examination as to details, but giving effect to all his testimony and that of others, it is our conclusion, his communications to Joseph R. and Octave Hymel may be epitomized in the reference by him to the investments in the safe of the company. To Mrs. Tassin, the communication of DeJahan was in effect, that all had been done with reference to the pledge as proposed to her by Pierre Lanaux, that is, the execution of the note placing the note and securities in the package marked for her; the package in the box, the box in the safe of the company, in the bank's vault, his instructions to deliver to her, and DeJahan also stated that he and George Lanaux had accepted the commission confided to them by the deceased. This last statement conveyed the inference of the witness, but the fact is, George Lanaux, entirely

Succession of Lanaux.

ignorant of the contents of the box, had no such commission and had never even heard of it.

It is substantially on this state of facts this court is now called on to sustain pledges of securities in the debtor's bank box, never taken from it till his death, and then by his executor. It is urged on us that the facts bring the asserted pledges within the essentials so plainly expressed in the Code, that no pledge exists without actual delivery to the creditor or to a third person for him. The symbol of the pledge in the Roman law is the fist of the creditor closed on the pledge, denoting that actual possession which all recognize as linked to the pledge, and without which none can exist. We are, responding to the case of the creditors, to hold that these securities in Pierre Lanaux' box in bank, directed to be delivered, but never taken from it, are, notwithstanding, to be deemed not in his possession, but in that of some third person for the creditors. If we are to reach any such conclusion, it must be on some theory of constructive possession not capable of easy appreciation.

We can hardly conceive, even on this theory urged on us of constructive possession, or constructive holding, how the cases of the Hymels and Denis Lanaux can be supported. The intercourse with Octave and Joseph R. Hymel with the deceased factor, and subsequently after his death with DeJahan, that can be deemed to have the faintest relation to these securities, has been stated. It will not be pretended in that intercourse any one was agreed upon or suggested to take possession of the securities for them, still less can it be maintained there was ever the shade of any such possession, unless packages in Lanaux' box is to be deemed not in his, but in the possession of some other. With respect to Denis Lanaux and Seraphin Hymel, there was no intercourse with reference to the box or its contents. A day or two after the death of Mr. Pierre Lanaux, DeJahan spoke to Denis Lanaux of a letter in the box for him. That was all he ever heard of the box until the opening, under the order of the court, disclosed the package marked with his name. With Seraphin Hymel all intercourse or knowledge of box or contents is a blank. The claims of these, the Hymels and Denis Lanaux, may at once be laid aside. There is no pretence of delivery to them of the asserted pledges. It would do violence to the record were we to maintain that there was ever the selection of any third person to hold the securities for them, and still greater violence, if we held there was the shadow of any such possession.

Succession of Lanaux.

Is the case of Mrs. Tassin any stronger? The actual custody of the box containing the securities when Lanaux died is susceptible of no dispute. Whether George Lanaux, who received it from Pierre Lanaux nor the company nor the bank in whose vault the box was placed, is deemed custodian, is immaterial. Could the possession of any one of them be deemed that of Mrs. Tassin? Neither George Lanaux, or the company or the bank had the slightest intimation of her non-asserted interest in the contents of the box. With the fact that must be conceded, that the box, was thus received and thus held, it is plain that no other relation of ownership or accountability grew out of the deposit of the box other than that arising daily when the customer sends his box to the bank. It must be apparent then, that George Lanaux held this box for Pierre Lanaux, and in no sense for Mrs. Tassin, whose asserted pledge rests on the theory of her possession, actual or constructive of the securities claimed by her in that box. The fact that George Lanaux received the box from, and held it for Pierre Lanaux, must be accepted and exert its influence in the solution of the vital issue as to the possession of these securities.

Whatever qualifications may be claimed to arise from the previous negotiation between Mr. Lanaux and Mrs. Tassin in reference to the asserted pledge, or from the fact that subsequent to the negotiation he placed the package of securities bearing her name in the box, or from the additional circumstances that the clerk of the debtor with the key of the box had his instructions, never fulfilled, to deliver to her the package, and that these instructions at the request of the debtor had been communicated to her, still, whatever the force, if any, of these qualifications, or of any other the record exhibits, the unalterable fact remains that when the death of the debtor occurred which fixes the rights of all creditors as they exist at that moment, the securities now claimed to have been in the possession of a third person agreed on to hold for the creditor asserting the pledge were in the debtor's bank box deposited as his property. There is in this branch of the case another impressive feature. When Pierre Lanaux unfolded his plan to secure Mrs. Tassin the payment of the large balance in his hands, along with the placing the note in her favor and the package of securities bearing her name in the box, and along with the instructions for delivery to his clerk, and the deposit of the box, it was part of that plan that George

Succession of Lanaux.

Lanaux receiving the box, was to be instructed to hold the box subject to the order of the clerk. If these instructions had been given and accepted, as doubtless they would have been, by George Lanaux, the case of Mrs. Tassin would at least in this respect have presented a different aspect. There would have been the basis for the argument, to whatever extent it might avail, that the box was held for DeJahan along with his mandate of delivery to Mrs. Tassin. But the deceased factor, sick when the proposed pledge was discussed and attempted to be carried into effect, and unfitted for business, failed to bear in mind the precautions devised by him for the protection of the creditors. Death closed his lips without any instructions to George Lanaux in respect to the box. The record placed George Lanaux before the court as holding the box for him whose name it bore, and from whom it came. It can not therefore for one moment be contended that he bore the slightest relation to Mrs. Tassin. When the pledge is consummated by delivery to the third person to hold for the creditor, it is the natural result that a liability at once arises between the third person, thus selected, and the creditor. Now such liability in this case existed. Laurent thus puts it: "L'Article 2076 admet que le créancier gagiste est mis en possession lorsque le gage a été remis à un tiers, convenu entre les parties. Il faut donc une convention qui établisse un lien entre le tiers et le créancier gagiste, de sorte que le créancier gagiste possède par l'intermédiaire du tiers." Laurent, 28 Vol., p. 484. This case can be supported on no theory that George Lanaux held for the creditor, of whose asserted interest in the box he was ignorant, and to whom he sustained no relation whatever of trust or liability.

It is insisted, however, that the court, in solving the issue of the possession of these securities claimed by Mrs. Tassin as pledged to her, shall hold for naught that they were in the debtor's box, deposited and held for him, and never taken from it except by his executors when the debtor's death occurred. It is claimed that the pledge and possession of Mrs. Tassin is to be supported on the theory that George DeJahan had been selected to hold possession of the pledges for her and actually had that possession. Her whole case rests on that theory. Is it to be maintained that DeJahan ever was chosen to take these securities into his possession, or that he ever had the vestige of any such possession? All must realize the exactness of the Code that actual delivery of the pledge must be made to

Succession of Lanoux.

the creditor, or possession delivered to a third person chosen by debtor and creditor to hold for the creditor. What the Code means by this selection of a third person to hold for the creditor, and by his possession of the pledge, requires no comment. Was DeJahan ever clothed with any such agency or vested with any such possession? DeJahan's whole function with respect to the securities was derived from the order of his employer. That was to place the package of securities in his employer's bank box and deliver the package on the call of the creditor. That order certainly did not authorize the clerk to take the securities into his possession, to hold them for the creditor. Nothing of the kind was contemplated. If the creditor had called, she doubtless would have obtained the securities and thus obtained the possession essential to perfect the pledge. No such call was made, and the securities remained in the debtor's bank box undelivered. The clerk never conceived he had any authority to remove the securities from the bank box. When the creditor demanded the securities, after the debtor's death, the clerk declined, stating his authority ceased with the death; adding, however, the creditor's right would ultimately be secured. His refusal without any qualification, in our opinion, defined his power, because death revokes all unexecuted orders of the principal. There was then no agreement whatever that the securities claimed as pledged to Mrs. Tassin should be put in possession of the clerk, as a third person, to hold for Mrs. Tassin. Nor does it in the least affect the question that the clerk communicated the order of his employer to deliver to her, nor that she signified her assent. No license of construction enables us to transform an order of the employer to his clerk for the delivery, if called for, of securities from the employer's box in bank, into a mandate that the clerk shall remove the securities and take them into possession to hold for the creditor. Least of all, can we hold the clerk ever had that possession. Placed in the debtor's bank box, deposited and held as his property, the securities remained untouched until his death, and then were removed only by his executor to inventory the debtor's property. There was clearly no delivery of the securities, none to the creditor, none to a third person to hold for her. The pledge was inchoate, a delivery proposed but never accomplished. The case is of the class of pledges proposed but not perfected, and nothing is better settled than that an inchoate or executory contract of pledge, not per-

Succession of Lanoux.

fect by delivery, confers no rights as against other creditors. The death of the debtor fixes the rights of the creditors as they exist at that moment. The same rule is enforced when the debtor makes a surrender of his property to his creditors. No delivery had been made when that death occurred; none after was possible. Civil Code, Arts. 3133, 3152, 3162, 3182, 3183, 3185; 12 Rob. 243; 2 An. 872; 5 Rob. 101; 8 An. 582. See the cases collected in 1 Hennen's Digest, p. 686, No. 7; 2 Hennen's Digest, p. 1504, No. 1. The creditor's case lacks the life of the pledge in a controversy with creditors, *i. e.* delivery.

In a commercial community, especially, it is of importance the law of pledge should be clearly understood, and that requisites of common acceptance should not be made uncertain. The creditor's case exacts, we think, that the test of our law shall be displaced. The case may receive appropriate illustration by supposing that precisely such a pledge as is claimed here for Mrs. Tassin was proposed to any bank or business man. The proposition would be the execution of the borrower's note with securities attached, the note and securities placed in a package, marked with the lender's name, the package placed in the debtor's bank box, the box deposited in bank by the debtor, his clerk instructed to deliver the package on the call of the creditor, and the creditor notified when all this is done, and of the instruction given the clerk. Does any one suppose that a dollar could be obtained on any such so-called pledge of securities to be kept in the debtor's bank box, supplemented by his direction to the clerk for delivery to the creditor? Would any one suppose that unless that delivery was obtained there would be any pledge as against creditor of the debtor? On the contrary, the prompt answer of any bank to any such proposition would be, that putting securities in the debtor's bank box with all the formalities and instructions indicated, was neither delivery to the creditor nor to a third person to hold for him, and hence there was no pledge. If a pledge, dependent as it is on delivery to the creditor, or the third person to hold for him, can be accomplished in the mode we are asked to recognize in this case, *i. e.* of securities never out of the debtor's bank box from the time he placed them in it until his executor took charge of them, there would be no limit to the pledges the debtor might make of the same property. To each lender the debtor might tender the security of his own bank box,

Succession of Lanoux.

with the directions to his clerk of delivery to the creditor. The delivery obtained by any of those relying on this bank box pledge would demonstrate that all the others had no pledges. This theory that pledges can be made without the complete dispossession of the debtor, and that the pledge may be consummated by marking the creditor's name on the package of securities in the debtor's bank box, supplemented by his unexecuted order for delivery given to his clerk and communicated to the creditor, finds its answer in our Code, in the text books and adjudicated cases. That answer is: the pledge requires possession in the creditor. Without that possession the pledge is inchoate or "executory" only as between the debtor and the asserted pledge creditors, but gives no right whatever as against other creditors.

Boilleux thus puts it: "Une appréhension manuelle est de l'essence du contrat de gage, on conçoit que le législateur ait du subordonner les droits du créancier a cette condition, puisqu'il ne s'agit pas d'un privilege proprement dit, c'est-à-dire d'un droit attaché a la qualité de la créance; mais d'une préférence fondée sur les possessions: si le débiteur ne se dessaisissait pas le gage ne serait pas qu'une source de fraudes, rien ne l'empêcherait pas de conferer successivement a plusieurs personnes des droits sur la chose" (7 Boilleux, p. 129). This commentator on the Napoleon Code is felicitous in his development of the policy to guard against frauds that require the complete dispossession of the debtor of the pledged property, but all the text books insist on that dispossession. See in addition to the authorities cited Story on Bailments, Sec. 299; Casey vs. Cavaroc, 96 U. S. 477; Story on Agency, Sec. 367 *et seq.*

Adhering, as we think, to the text and spirit of the Code, it is our conclusion the pledge claimed for Mrs. Tassin was never perfected. There was neither delivery to her nor possession for her in a third person. The bonds and securities claimed as pledged to her, never delivered but in the debtor's possession at his death, are to be deemed the common pledge of all his creditors. Civil Code, Art. 3183.

It is therefore ordered, adjudged and decreed that our former judgment be avoided and set aside, and it is now ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

DISSENTING OPINION.

WATKINS, J. With respect to the claim of the opponent, Mrs. Tassin, the question is whether the possession of DeJahan was such that her privilege had struck the collaterals that were attached to the note of Pierre Lanaux so effectually as to have consecrated their proceeds to its payment, had said collaterals been seized and sold by any other creditor of Lanaux.

The contention of Mrs. Tassin's counsel is that, at the request of Pierre Lanaux, it was agreed between him and Mrs. Tassin that she should loan Lanaux the sum of forty thousand dollars out of her funds then in his hands, on his demand note, to be secured by a pledge of Louisiana State consols and New Orleans Insurance Association stock as collateral security. That it was further agreed between said parties that the pledge was to be arranged in the following manner, namely:

The note, together with the securities, were to be placed in the possession of George DeJahan, who was to place them in a bank box, which was to be placed on deposit by DeJahan in an iron safe of the New Orleans Insurance Association, at the time in the branch depository of the State National Bank, and in the custody and under the control of the secretary of the insurance association, who alone possessed the combination of the vault and safe.

That the secretary of the insurance association was instructed to deliver the box containing the securities to DeJahan on his demand, the latter having instructions from Pierre Lanaux to deliver the note and pledged securities to Mrs. Tassin on her demand.

That on the 3d of August, 1892, the note and act of pledge were executed, and they, together with the accompanying securities, were placed in the box and the box was placed in the safe of the insurance association, where it remained uninterruptedly until after Lanaux' death.

That on the 7th of August, following the date of the selection of the securities, and in pursuance of the previous agreement of Mrs. Tassin and Pierre Lanaux, and by direction of Pierre Lanaux, DeJahan visited Mrs. Tassin at her plantation in the parish of St. John, and explained to her all that he had done—describing the note which he had executed for Lanaux to her order, with the designated securities attached—and that Mrs. Tassin expressed herself satisfied

Succession of Lanaux.

that he had carried out the aforesaid agreement, and approved of what he had done.

That immediately after the death of Pierre Lanaux, Mrs. Tassin called on DeJahan, and, in person, demanded the note and securities; but he declined, because, in his opinion, the death of Lanaux had terminated his authority in the premises.

The facts bearing on the foregoing propositions are detailed substantially by two or three of the witnesses, and it may be fairly summarized as follows, viz.:

Mrs. Tassin states that she had three separate and distinct interviews with Pierre Lanaux on the subject of her business, then in his hands, viz., on the 11th of June, 1892, on the 21st and again on the 25th of July, 1892.

In the first interview, she gave him instructions to invest for her, in State bonds, the balance of forty-five thousand nine hundred and seventeen dollars and twenty-six cents then remaining in his hands to her credit; in the second, she agreed to loan him forty thousand dollars on his demand note, secured by a pledge of State bonds of the par value of thirty-five thousand dollars, and in stocks of the New Orleans Insurance Association sufficient in amount to cover the balance of five thousand dollars; in the third, there was a repetition of the second, the details thereof being reiterated.

She states that Pierre Lanaux' proposition was to place his demand note for forty thousand dollars, with the aforesaid securities attached, in the hands of George DeJahan, which he would instruct him to place in a bank box in the safe of the New Orleans Insurance Association, to which George Lanaux, secretary of the company, had exclusive access; and that, at the same time, he would instruct the secretary to hold the box subject to the order of DeJahan, who was to be authorized to deliver said note and securities on her demand.

That, in her last interview with Pierre Lanaux, the latter inquired of her to know if she perfectly understood all the instructions he had previously given her, and that she replied in the affirmative.

Mr. George DeJahan makes the following statement, viz.:

"Mr. Pierre Lanaux gave me instructions before leaving—that is to say, a few days before, on the 2d of August, he told me to make a note for Mrs. Tassin; to place forty thousand dollars for Mrs. Tassin, or thirty-five thousand Louisiana State bonds, and to com-

Succession of Lanaux.

plete the balance of the pledge with New Orleans Insurance Association stock."

Again he states:

"On the 3d of August Mr. Lanaux told me that he had given instructions to Mr. George Lanaux to call upon me for a certain box, in which I was to place the pledges for Mrs. Tassin and (others) * * * Mr. Pierre Lanaux called at the office (on) the 3d, at about 2 P. M. He asked me if I had executed his orders. I told him yes. I went to the bank and got the box. I brought it into the office, opened it in his presence, exhibiting to him the notes for all these different parties, made packages before him, and replaced them in the box.

"That was on the 3d of August."

Again he says:

"Mr. Lanaux' instructions were to deliver to the parties whose names were on these packages, at their request."

He states that on the 4th of August, at about 11 or 12 o'clock M., he telephoned George Lanaux, secretary of the insurance association, that he was ready to deliver to him the box, and he came and met him, and that they went together and placed the box in his safe, in the vault of the insurance association.

He further states that he retained the key to the bank box, which continuously remained in the safe until after the death of Pierre Lanaux, and was then delivered to him by George Lanaux, and he opened it in his presence.

He was asked the question whether he would have delivered the packages to the parties named if they had demanded them; and his answer was that he would, as Mr. Lanaux had instructed him to deliver the packages to the parties named on the back of the different envelopes, upon their demand. He concludes his answer by making this statement:

"His instructions were to put them in the box, as I stated yesterday, subject to their demand."

This witness further states that he went to "Mrs. Tassin's house on the 7th of August, 1892, * * and told (her) that Mr. Lanaux had placed—invested for her, forty thousand dollars on his note, secured by thirty-five thousand dollars of Louisiana fours, and five hundred and twenty shares of New Orleans Insurance Association, as he had promised her. Mr. Lanaux had told me to go there.

Succession of Lanaux.

" Q. Did he instruct you to go there and inform her ?

" A. Yes.

" Q. After you related to her (Mrs. Tassin) what occurred on the 3d of August, did she say anything ?

" A. Well, she said it was all right, according to what Mr. Lanaux had promised her."

This witness again states that after Mr. Lanaux' death, Mrs. Tassin called on him for the note and securities, but he declined to deliver them, because, in his opinion, his authority from Pierre Lanaux ceased at his death.

Counsel for the executor said, interrogatively, " And, therefore, you knew that when he died you would have no power over it, for the reason that it (the box) must be opened in his estate.

" But his answer was ' no; I did not think it belonged, even after his death, to his estate.' "

" Q. The instructions of Mr. Pierre Lanaux were up to the time of his death ?

" A. He did not specify up to the time of his death. The words were: ' You will deliver these packages to the parties whose names are on them, on their demand.' Those were the only words he spoke to me in reference to these packages."

The witness then repeats, that the investments or pledges were thus made and placed in a bank box, and the parties were duly notified of the fact of the pledges having been made; and that their accounts current were duly credited with the proper amounts, corresponding with the amount of the secured notes.

Mr. George Lanaux states that on the 2d or 3d of August, 1892, Pierre Lanaux " crossed over from the State National Bank to the office of the New Orleans Insurance Association, came to (his) office and said, ' George, can you put a bank box in the iron safe of your company?' To which question the witness replied, ' It depends on the size of the box. Our iron safe is pretty full.' Lanaux said, ' Try and put the box in the safe; George DeJahan will give you the box.' That was all that P. Lanaux said to me in relation to the box. That was in the morning between 10 and 11 o'clock. About 2 o'clock that same day I telephoned to DeJahan * * * asking him if P. Lanaux told him about a bank box which I was to put in the safe of the New Orleans Insurance Association. He said yes, but he was not ready to put the box in the safe, but would telephone

Succession of Lanaux.

me. * * * The following day DeJahan telephoned that he was ready to put the box in the safe of the company. I answered, to wait for me at Lanaux' office, that I was coming immediately. I left my office and proceeded to Pierre Lanaux' office on Conti (street), and together, accompanied by DeJahan, *took the bank box from the desk in P. Lanaux' office* and went to the Branch Depository State National Bank, corner of Royal and Conti streets, and having assistance of employes of the bank we went into the vault where our safe is. I opened the safe and after having moved certain securities from one shelf to another we succeeded in putting in the bank box. * * * There is no key to the safe. There is a combination. I had the combination. I was the only person who had the combination."

On being asked if he knew anything of the contents of the box, said he did not.

He further states:

"On the 6th of September I delivered the box to George DeJahan, who called for it. I had received it from George DeJahan. * * * He returned it to me in the course of five minutes."

This witness again says:

"I surrendered the box to DeJahan, having received it from him. *I did not know whose agent he was, or considered himself to be.* That I can not answer. DeJahan will answer that. You can not expect me to answer for DeJahan."

Mr. Denis Lanaux stated that "the first time he saw this tin box was on the 6th of September * * * with DeJahan and George Lanaux. I had been informed by DeJahan that *he had a box*, which box was in the safe of the New Orleans Insurance Association, which was in the vault of the Branch Depository of the State National Bank," informing witness of the contents.

He said that George Lanaux opened the vault and DeJahan opened the bank box. "We found packages—one marked 'Property of Mrs. Tassin,'" etc. He again said: "DeJahan told me *he had the bank box.*" and being asked "when he was so informed by DeJahan," replied that "it was on the 4th or 5th of September, * * * *two or three days before Lanaux died.*"

On this evidence there can be no doubt of the following facts being fully established, viz.:

Succession of Lanaux.

1. That there was an agreement between Pierre Lanaux and Mrs. Tassin that certain specified collaterals were to be attached to his demand note for forty thousand dollars in her favor, as security therefor.

2. That the note was accordingly executed and the aforesaid collaterals were thereto attached, and that same were placed in an envelope endorsed "*Property of Mrs. F. E. Tassin,*" and that this envelope was deposited in a bank box, that was locked, and deposited in a safe in the vault of the New Orleans Insurance Association.

3. That DeJahan was proposed by Pierre Lanaux as the person who was to carry the agreement between himself and Mrs. Tassin into effect, and that Mrs. Tassin was so informed, and unequivocally accepted the proposition.

4. That Pierre Lanaux gave DeJahan instructions in exact conformity with the aforesaid agreement; that in pursuance of said instructions DeJahan accepted the trust, and made and executed in favor of Mrs. Tassin a demand note for forty thousand dollars and signed *per pro.* Lanaux; and to that note attached the specified collaterals, and placed them in a bank box, and locked the box and deposited it in the iron safe of the New Orleans Insurance Association—retaining the key in his possession.

5. That in pursuance of the instructions of Pierre Lanaux, DeJahan visited Mrs. Tassin at her plantation in the parish of St. John, for the express purpose of reporting to her, carefully and succinctly, all he had done, *as Mr. Lanaux had promised her he would,* and which she acknowledged to DeJahan *had been done according to their agreement.*

6. That DeJahan, assisted by George Lanaux, secretary of the insurance association, and other bank employés, placed the bank box containing the securities specified in the safe of the insurance association in the vault of the company—DeJahan retaining the key of the box and George Lanaux keeping the combination of the safe.

7. That the box thus remained on deposit and was not touched by any one until after the death of Lanaux, when George Lanaux opened the safe and permitted DeJahan to remove the bank box.

8. That on the 7th of September, 1892—the next day after the death of Pierre Lanaux—Mrs. Tassin called upon DeJahan for the delivery to her of the note and the pledged securities, but her request was declined on account of Pierre Lanaux' death—DeJahan explaining that she would receive them in a few days.

Succession of Lanaux.

9. That on the following day DeJahan, accompanied by Denis Lanaux, visited the Branch Depository of the State National Bank and called upon George Lanaux, secretary of the New Orleans Insurance Association, for the delivery of the bank box; that the secretary at once opened the vaults and safe of the insurance association and delivered the bank box to DeJahan, and that DeJahan produced the key, opened the box, and he and Denis Lanaux examined the packages therein deposited—whereupon the bank box with the pledged securities were returned to the custody of the insurance association.

Recurring to the query propounded, it appears that, in the light of the evidence detailed, it must receive an affirmative reply—that the possession of DeJahan was such that Mrs. Tassin's privilege so effectually struck the collaterals that she would have been entitled to the proceeds if any other creditor of Lanaux had seized and sent them to sale.

Or in other words, Pierre Lanaux absolutely lost, or discontinued control over the pledged collaterals from the moment the bank box containing them had been, by DeJahan, deposited in the iron safe of the New Orleans Insurance Association. After that date the custody of DeJahan was exclusively for the account of Mrs. Tassin, to whom he was directed by Pierre Lanaux to deliver upon her demand. With Pierre Lanaux' knowledge, and by his direction, the collaterals indicated by him and agreed upon by him and Mrs. Tassin *were segregated from his other assets*, were attached to his demand note in her favor, and placed in an envelope and marked, "Property of Mrs. F. E. Tassin," and by DeJahan deposited in a bank box of which he possessed the key. With the assistance of the secretary of the insurance association and others of its employés, the bank box containing these pledged securities was removed from the desk of Pierre Lanaux and deposited in an iron safe in the vault of the insurance association, of which its secretary alone possessed the combination—thus completely severing Pierre Lanaux' control and dominion over the box and its contents. And when DeJahan called on Mrs. Tassin and informed her of all that he had done, "*as he (Pierre Lanaux) had promised her,*" and Mrs. Tassin expressed *her approbation of the acts he had performed,* "*as Mr. Lanaux had promised her,*" the *vinculum* of the contract was completed by her acceptance; and henceforth DeJahan was *exclusively her agent*.

That DeJahan so understood his position is fully attested by his

Succession of Lanaux.

statements to the effect (1) that Mr. Lanaux' instructions were for him to deliver the pledged collaterals to the parties whose names were endorsed on the respective packages at their request; (2) that the instructions of Pierre Lanaux *were not up to the time of his death*, but that he was to deliver upon the demand of the pledgees; (3) that he (DeJahan) informed Mr. Denis Lanaux *two or three days prior to the death of Pierre Lanaux* that he held a box in the safe of the New Orleans Insurance Association, containing pledged securities; (4) that *immediately after the death of Pierre Lanaux* DeJahan visited the vault of the insurance association in company with Denis Lanaux, and the secretary of the insurance company opened the vault and the safe, and delivered the box containing the securities into the hands of DeJahan, and he unlocked it in the presence of the secretary and Denis Lanaux, and thereupon he and Denis Lanaux examined the securities that were found in the box, and, among the number, the package endorsed "Property of Mrs. F. E. Tassin;" (5) that after their examination was completed the packages were returned to their places. Mr. DeJahan locked the box and returned it to the custody of the secretary of the insurance association, and he in turn placed the box in the iron safe, closed it, as well as the vault, he alone possessing the combinations. What more could have been done, or what additional formality could have been observed, to have *perfected the delivery* of pledged collaterals, *to a third person agreed upon by the parties*.

The text of the law is, "It is *essential* to the contract of pledge that the *creditor be put in possession* of the thing given him in pledge, etc." R. C. C. 3152.

But there is an express qualification placed upon this article in these words, viz.:

"In no case does this privilege (R. C. C. 3157) subsist on the pledge, *except* when the thing pledged, if it be a corporeal movable, or the evidence of a credit, if it be a note or other instrument under private signature, *has been actually put and remained in the possession of the creditor, or of a third person agreed upon by the parties.*" R. C. C. 3162.

Was not DeJahan the third person agreed upon by the parties? Was not his selection duly notified to him? Did he not carry out his instructions to the letter in the preparation of the note and pledge and in giving to Mrs. Tassin information of his having performed all the acts that Pierre Lanaux had *promised her* should be

Succession of Lanaux.

performed? Did not Mrs. Tassin specifically approve and accept same, and subsequently call on DeJahan for the note and pledged collaterals in keeping with Lanaux' directions to deliver on his order? And, finally, did not DeJahan declare to Denis Lanaux, *before Pierre Lanaux' death*, that *he held possession of the pledged collaterals*; and, *after Lanaux' death* did not the secretary of the insurance association deliver them to him? And can it be doubted, in view of the act of the secretary in surrendering the actual possession of well nigh \$150,000 of State bonds into the power of DeJahan two or three days after the death of Pierre Lanaux, that DeJahan had a right of custody and control, entirely independent of Lanaux? There can be no other solution of the question.

What is the answer to the foregoing proposition? That of the District Judge was—as appears from his reasons for judgment—that the instructions of Lanaux to DeJahan “were those of an employer to his clerk.” That Lanaux “said nothing about the bank box, or of DeJahan's holding it, or the securities it contained, as the agent for any one, or as a party agreed upon with whom the box and securities were to be deposited; nor did he, at the time, instruct DeJahan to notify the pledgees that the securities had been placed in the box subject to their demand; but DeJahan testifies that he did so, at some time not mentioned in the testimony.”

It is evident that the Judge *a quo* was under a misapprehension of the facts adduce in evidence on all of the foregoing propositions. Pierre Lanaux being dead his lips are sealed and can not speak; but DeJahan's testimony is clear and unmistakable. He says—using his own words: “His instructions were to put it in the box, as I stated yesterday, subject to their demand.” Again: “He did not specify up to the time of his death. His words were: ‘You will deliver these packages to the parties whose names are on them on their demand.’”

Again: “I went to Mrs. Tassin's house on the 7th of August, 1892, * * * and told her that Mr. Lanaux had placed, invested for her forty thousand dollars on his note, secured by thirty-five thousand dollars of Louisiana fours and five hundred and twenty shares of New Orleans Insurance Association, *as he had promised her. Mr. Lanaux had told me to go.*

“Q Did he instruct you to go there and inform her?

“A. Yes.

Succession of Lanaux.

"Q. After you related to her (Mrs. Tassin) what occurred on the 3d of August, did she say anything ?

"A. Well, she said that it was all right, *according to what Mr. Lanaux had promised her.*"

From the foregoing, it is perfectly evident that DeJahan had been made acquainted with "*what Mr. Lanaux had promised her,*" and that one of the things he had promised her was that DeJahan was to deliver the securities to her on her demand. It is equally evident that he did inform Mrs. Tassin that he had deposited Lanaux' note and the securities he had specified in their previous agreement, which he would deliver on her demand; and that she expressed herself satisfied that he had done *all that Lanaux had promised her.* It is likewise evident that the dates, places and circumstances are all precisely detailed, with perfect accuracy.

That DeJahan was, at the time, the clerk of Pierre Lanaux, is a matter of no consequence.

The following queries have been propounded, the trend of which is to show that DeJahan acted in the capacity of Lanaux' clerk throughout all of these transactions, and that, consequently, the bonds were at all times in Lanaux' possession, being in his bank box.

The two must be taken together, as one is but the counterpart of the other.

"(1) Can this court hold as a proper interpretation of the law of pledge—

"That a debtor putting bonds in a package, marked with the debtor's name, instructing his clerk to deliver, the creditor apprised in advance that instructions will be given, and notified afterward by the clerk—consummate the pledge, although the instructions were not fulfilled, and the bonds always remain in the *debtor's box.*

"(2) Would any bank take such a pledge—*i. e.,* lend money on the debtor's bonds, *in his bank box,* and on his direction to *his clerk* to deliver; or would the bank have any pledge unless the *clerk* delivered?"

Both of these questions may be answered in the negative without in any manner affecting the claim of Mrs. Tassin.

If it be conceded that DeJahan was acting as Lanaux' clerk in the transaction with Mrs. Tassin, and that the collaterals remained in Lanaux' custody all the while, of course there was no pledge. But DeJahan was the third person agreed upon between Pierre Lanaux

Succession of Lanaux.

and Mrs. Tassin to hold the collaterals for the latter. And, though the box may have been the property of Pierre Lanaux, it was removed from his possession *before* the collaterals were placed in it; and when the collaterals were deposited in the box DeJahan locked it, and thereafter retained the key. Then DeJahan, assisted by the secretary and his employés, put the box in the safe of the insurance association, to which the secretary alone possessed the combination. No one had access to the box but DeJahan, and the secretary gave him access to it, *after the death of Pierre Lanaux*—he being accompanied by George Lanaux. And, while it is true that DeJahan was the *clerk* of Pierre Lanaux within the scope of the latter's business, he was, at the same time, the *third person* agreed upon by him and Mrs. Tassin to hold the securities for the latter. There is no incompatibility between the two positions. This was distinctly held in *Weems vs. Delta Moss Company*, 33 An. 974, this court declaring that "the objection that the two custodians of the property pledged were employés of the company has no force, and can not destroy the effect of delivery to Richard."

Consequently, this is not the case *supposed* of collaterals being in a *debtor's bank box*, who had given his *clerk* instructions to deliver, which instructions he had not fulfilled; but it proceeds on the theory that DeJahan was the *third person agreed upon by the parties*, and that *he had possession*, with instructions to deliver to Mrs. Tassin, on her demand—within the plain and evident meaning of the Code.

But a further proof of Pierre Lanaux' lack of possession and control of the collaterals is furnished by the procuration that was annexed thereto, authorizing the pledgee—not DeJahan—to sell the collaterals. Such a mandate to the pledgee is an adjunct of the pledge, and inseparable from it. Such a mandate is, in its nature, irrevocable. *Journal du Palais*, 12 and 19 of 1827. And in *Renshaw vs. His Creditors*, 40 An. 37, this court said: "The same principle applies in every case where the mandate is granted as a condition of the contract, or as a means of executing it."

"In such case, the mandate, forming an element of a synallagmatic contract, is impressed with the qualities of such a contract, and is irrevocable. *Journal du Palais*, 7 July, 1837."

And the court further observes:

"It is plain that the powers of attorney here involved belong to

Succession of Lanaux.

the class which have been described, forming important adjuncts of the contracts of pledge themselves, and stipulated in the interest of the mandatories; that the mandator had no power to revoke them, and hence they are equally irrevocable," etc. 40 An. 40, *Renshaw vs. Creditors*.

After its execution, Pierre Lanaux had no more power to revoke this mandate to the pledgee to sell than he had to revoke the note he had executed. When executed and delivered into the hands of the depositary agreed upon between himself and Mrs. Tassin, the mandate became irrevocable in so far as he was concerned.

The only question for consideration is, whether the agreement between pledgor and pledgee, and the possession of the third person agreed upon, was binding on Lanaux' creditors, or, in other words, whether Mrs. Tassin's privilege could be enforced on the proceeds of the securities pledged in case they had seized and sold them—as they evidently had the right to do. *Auge vs. Variol*, 31 An. 865.

If the pledge in favor of Mrs. Tassin was in keeping with the Code it was evidently binding on these creditors of Lanaux.

And as the Code authorizes that a contract of pledge may be effected by delivery of possession of the thing pledged to a third person agreed upon by the parties, the only question in this case is, whether DeJahan had an effectual possession of the bonds. The only figure that the secretary of the insurance association cuts in the transaction is that, being the custodian of the company's vault where the bank box was deposited, his custody proved the possession of DeJahan, and disproved the possession of Pierre Lanaux.

If so, the Code declares that the privilege of the pledgee does subsist on the thing given in pledge, (1) when "it has been actually put and remains in the possession of the creditor;" (2) or when "it has been put and remains in the possession of a third person agreed upon between the parties." R. C. C. 3162.

The latter character of pledge has been frequently and recently recognized and enforced by this court, on evidence far less clear and cogent than that which is afforded by this record.

In *Conger, Exr., vs. City of New Orleans*, 32 An. 1250, a case is presented of a demand for three twenty-year bonds of the city of New Orleans which the city had pledged—retaining the bonds in her own possession, she being the debtor; and this court said:

"Possession, though essential to the validity of the pledge, need

Succession of Lanoux.

not be always in the creditor. It is sufficient that the thing pledged be in one occupying *ad hoc* the position of a trustee.

"The *debtor himself* may, in some cases, be considered as such trustee, and be given possession of the thing by him pledged, *provided his tenure be precarious* and clearly for the account of the creditor. The Louisiana doctrine is in perfect accord with both common, Roman and French laws. R. C. C. 8162; C. N. 2076," and various cited authorities, particularly Pothier Pandects; Bell's Commentaries on Scotch Law; Troplong Nant.; Dalloz Rep., and Duranton.

The authority of the Conger case has been followed and approved by this court in many subsequent and well considered cases.

In *Weems vs. the Delta Moss Company*, 38 An. 973, a case is stated of a pledge having been made of the building and factory of the company and its various movable effects, enumerated in the act of pledge, which was entered into between the president of the company and the creditor, appointing one of the company's employes as custodian. And that pledge was maintained against the creditors of the company after it became insolvent—on the authority of the Conger case.

In *Jacquet vs. His Creditors*, 38 An. 863, a case is stated of a pledge having been executed of certain machinery used for the manufacture of tobacco, consisting of boilers, engines, cutters, etc., which was agreed to by the parties, who selected a third person as custodian—the act of pledge stipulating a right of sale in the pledgee. Same was maintained against the creditors of the partnership after the surrender of the pledgors, on the authority of the Conger and Jacquet cases.

In *Woodward vs. the American Exposition Railway Company*, 39 An. 566, a controversy is stated between the plaintiff, asserting a privilege resulting from a pledge of certain iron rails and other appurtenances used in the construction of a railroad, and which had been secured by an act of pledge of the railroad and all of its appurtenances by placing same in the custody of a third person named—the plaintiff's privilege being resisted by an intervenor claiming a privilege upon certain lumber he had sold the company for the purpose of building bridges, etc. The demand of the intervenor was rejected, and that of the plaintiff was sustained—his privilege as pledgor of the railroad, in its entirety, being sustained as upon *personal* property, on the authority of the Conger, Weems and Jacquet cases.

Succession of Lanaux.

In *Levy vs. Ford*, 41 An. 873, a case is stated of a pledge of mortgage note for seven thousand dollars for the security of two different claims of two different creditors—a third person holding possession as the mutual mandatory of the pledgor, and the two pledgees, they each having a limited interest in the pledged collateral. This pledge was maintained as against a competing mortgage creditor of the pledgor.

Peters vs. Pacific Guano Company, 42 An. 690, presents the case of the agents of a company engaged in the manufacture of guano, giving in pledge to two lenders of money in Boston, on a cargo of guano, a bill of lading for the goods *in transit* to the consignee thereof at New Orleans—one of the pledgees holding for the two. This court not only maintained the pledge with respect to the people in Boston, but held also that it extended to the consignees of the agents in New Orleans, as well as to the New Orleans bank, to whom he assigned it for another and independent loan—all without the specific knowledge of the guano company, the agent's authority being purely derivative.

On the authority of the foregoing well-considered cases, interpreting the provision of the Code, which declares that a privilege subsists on the thing given in pledge, "if it has been put and remained in the hands of a third person agreed upon" (R. C. C. 3162), the jurisprudence of this court may be considered thoroughly settled as to the question that is controverted in this case, not only with regard to the parties *inter se*, but with regard to creditors, privileged as well as ordinary, even in insolvencies and successions.

As opposed to the foregoing decisions the opposing creditors cite and rely on *Casey vs. Cavaroc*, 96 U. S. 467, which is a Louisiana case, and is predicated on Louisiana decisions and precepts of the civil law, as stating a different rule.

In that decision a case is stated of a New Orleans bank offering to make a pledge of collaterals as security to the *Société de Credit Mobilier*, of Paris, France, for proposed acceptances; the bonds and notes to be placed on deposit with a third person named and agreed upon between the bank and the society, said third person becoming guarantor of the bank.

The question raised in that case was, whether "there was such a delivery and retention of possession of the collateral securities as to constitute a valid pledge by the law of Louisiana?" And making answer to that query the court said:

Succession of Lanoux.

"Clearly they were never out of the possession of the *officers of the bank*, and were never out of the bank for a single moment, *but* were always subject to its disposal, in any manner whatever, whether by collection, renewal, substitution or exchange, and collections, when made, were for the account of the bank."

In support of their opinion the court refers to only two decisions of this court as bearing on the question at issue, and those decisions were rendered in *Geddes vs. Bennett*, 6 An. 516, and *Succession of DeMeza*, 26 An. 35. In those cases pledges were not sustained.

In the *former* a case is stated of certain barrels of whiskey being the object of a pledge, the creditor permitting the pledgor to remove them to his own premises, on his simple receipt, he subsequently making sale of them to another. In a suit of the pledgee against the purchaser the sale was maintained.

That case has not the least applicability, in my conception, to the *Cavaroc* case, nor to the instant one, for the reason that it was *not* the case of a thing being given in pledge, by placing it in the hands of a third person agreed on.

In the *latter* case certain creditors of the deceased having made advances on the faith of an insurance policy, which he had left in the hands of his book-keeper, with instructions to deliver, the right of pledge was denied, on the ground that the *creditors* did not have the possession requisite to constitute a pledge—this court holding "that the policy was never beyond the control of *DeMeza*, and that *Myers & Levy* (creditors) never had the requisite possession thereof. *The book-keeper never held the policy as agent or trustee for Myers & Levy.* Although informed of his employer's intention in regard to one of the policies, he was *never entrusted to deliver to Myers & Levy or any one else.* There was, therefore, *no delivery of the policy to Myers & Levy, although the deceased intended to do so.* Consequently they never held it as a pledge, as collateral security, for their accommodation endorsements." (Our italics.)

It is evident, upon simple perusal of that paragraph of the opinion, that it was a case of alleged possession by the *creditor* of the collaterals, and not that of a third person agreed upon by the creditor and debtor.

The two cases are exactly parallel, and, in my opinion, not in line with the *Cavaroc* case.

In that case the court made an extensive examination and colla-

Succession of Lanaux.

tion of cases, and in its summary gives a very clear and comprehensive definition of the character of possession that is necessary to complete a pledge in the hands of a third person agreed on.

"The difference, say the court, "ordinarily recognized between a mortgage"—*i. e.*, at common law—"and a pledge is, that *title* is transferred by the former, and *possession* by the latter. Indeed, possession may be considered as of the essence of a pledge (Pothier Nantissement); and if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual. It may be constructive, as when the keys of a warehouse containing the goods pledged are delivered, or a bill of lading is assigned.

"In such case, the *act done* will be considered as a *token* standing for the actual delivery of the goods. It places the property under the power and control of the creditor.

"In some cases, such constructive delivery can not be effected, without doing what amounts to a transfer of the property also.

"In such case, there is a *union of two distinct forms of security*—the pledge and mortgage; mortgage by virtue of the *title*, and a pledge by virtue of the possession.

"*This advantage exists when notes and bills are transferred to a creditor by way of collateral security.* The possession gives them the character of a pledge. The endorsement, if payable to order, and their delivery, if payable to bearer, gives him the *title* also; which is something more than a pledge.

"This double title existed in *White vs. Platt*, 5 Denio (N. Y.) 269, and *Clarke vs. Islin*, 21 Wall. 360. Hence the actual possession of the securities by the creditor was a matter of less importance in those cases."

So in the instant case, the collaterals being of the class of commercial paper that are payable to bearer, and which, consequently, pass a *complete title by mere delivery*, DeJahan had *title*, as well as *possession*—his possession being evidenced by his possession of the key to the box in which the securities were kept, and to which no one else had access, and upon which the opponents acquired no right during Pierre Lanaux' lifetime.

But even if it be considered doubtful whether DeJahan held possession independently of Lanaux for the account of Mrs. Tassin, the court, in the Cavaroc case, cited various cases in which precedents are given of privileges having been recognized, as against creditors,

Succession of Lanaux.

even when the pledgor retained precarious possession of the thing pledged—as intimated in the Conger case.

A case in point is that of *Clarke vs. Islin*, 21 Wall. 860, in which the court held that the pledge was not vitiated by the pledgee returning the collaterals pledged to the pledgor for collection.

Also the case of *White vs. Platt*, 5 Denio. (N. Y.) 269, to same effect—the court holding that in such case the pledgor acts as the servant or agent of the pledgee, and the character of the security was not changed.

A strong case of the kind is cited from the Massachusetts court—*Macomber vs. Parker*, 14 Pickering, 497—of a pledge having been maintained through the *precarious possession of the pledgor*.

The pledgor was the proprietor of a brickyard, and the pledgee advanced the money requisite for the manufacture of bricks—the contract being that the bricks, as fast as made, should be pledged as security for the advances thus made; but the pledgor was to retain the bricks in his charge and sell them at retail and deposit the proceeds in bank to the credit of the pledgees.

Before sale the bricks in the yard of the pledgor were attached for a debt, but the pledge was maintained, the court employing this language, viz.:

“To say that the limited authority to sell the brick by retail, in small sums, on account of the plaintiff, was a waiver of their possession of the residue that remained in the kilns in their yard, would be clearly against the intent and meaning of the parties; unreasonable and unwarranted by the evidence.

“The special authority given by the plaintiff to the (brickmaker) was to clothe him with the character of an agent, to a limited extent only, and no remission to him, in his character of pledgor, of the plaintiff's right to retain the bricks according to agreement.”

The creditor's attachment was dissolved and the pledge maintained.

An example of this kind is furnished by Troplong, in treating of Art. 2076 of the Code Napoleon—of which Art. 3162 of our Code is but a repetition—of a merchant in Beaune having pledged sixty thousand bottles of Burgundy wine to a merchant of Baden as security for a debt—the wine having been delivered to an agent of the pledgee, it having been agreed that the pledgor should give it necessary attention and care.

Succession of Lanoux.

It so happened that the agent of the pledgee occasionally left the key of the vault in the possession of the pledgor, and on one occasion the latter removed some of the bottles of wine to his own premises, and subsequently to his surrender in insolvency the syndic insisted that the pledge was null and void on that account—the debtor and pledgor not having been dispossessed of the wine. But the validity of the pledge was maintained as against the creditors of the pledgor, in insolvency. Troplong, *Nantissement*, No. 311.

A like interpretation is given of the Code Napoleon by other French commentators. *Dalloz Repertoire*, Vol. 32, p. 455; *Duranton*, Vol. 18, Nos. 525 *et seq.*

The court in the Cavoroc case, citing two leading State decisions, express the further opinion on this question and say:

“So when the debtor is employed in the creditor’s service, his temporary use of the pledged article in the creditor’s business does not effect a restoration of the possession of the debtor. This is in accordance with the common and the civil law. *Reeves vs Copper*, 5 Bingham (N. C.), 136, was a case of this kind. A sea captain pledged his chronometer for a debt. He was afterward employed by the pledgee as master of one of his ships, and the chronometer was placed in his charge to be used on the voyage. It was held that the pledge was not lost. He recovered the chronometer as against a person to whom the master had pledged it a second time.

“In *Hayes vs. Riddle* (1 Sandiford, N. Y. 248) the plaintiff delivered to the defendant, at his request, a convertible bond of the New York & Erie Railroad Company (which had been pledged by the latter to the former) in order to get it exchanged for stock of the same company, which was returned and substituted for the bond in pledge. The defendant never returned, either the bond or the stock.

“The plaintiff brought action in trover against him for the bond, and recovered its value, being less than the debt for which it was pledged.”

Judge Story is in perfect accord with the views entertained by the Supreme Court, and in the course of an elaborate discussion of the question says:

“A possession is necessary to complete the title by pledge, so, by the common law, the positive loss, or delivering back of the possession of the thing, *with the consent of the pledgor*, terminates his title. However, if the thing is delivered back to the owner for a temporary

Succession of Lanaux.

purpose only, and it is agreed to be redelivered by him, the pledgee may recover it against the owner, if he refuses to restore it after the purpose is fulfilled. So, if it be delivered back to the owner in a new character, as for example, as a special bailee or agent. In such a case the pledgee will still be entitled to the pledge, not only as against the owner, but also as against third persons; for, under such circumstances, the possession is perfectly consistent with the existence of the original right of the pledgee." Story on Bailments, Sec. 299, citing various authorities.

In consideration of the authorities I have cited I think it can be safely affirmed that the pledge in favor of Mrs. Tassin was good and valid: (1) because the bonds were held by a third person agreed upon, with instructions to deliver on demand of the pledgee; (2) because they were deposited in a vault over which the debtor had no control, and in a bank box of which the third person agreed upon had the key; (3) because the pledgor had executed a power of attorney authorizing the pledgee to sell the thing pledged; (4) because the debtor had credited his books with the amount of the pledged collaterals and also the creditor's account; (5) because the *third person* claimed possession just *before* the pledgor's death, and was allowed to have access to the pledged collaterals *after* his death—the safe and vault being voluntarily opened by the secretary of the insurance association, and the box containing the securities being unlocked by the *third party* in the presence of others and the secretary.

And, finally, if it be considered that the bonds were, after their deposit, in any manner in the possession or under the control of Pierre Lanaux, through DeJahan, it was only a *precarious possession* for the account of Mrs. Tassin, and which can not be successfully opposed by the creditors of Lanaux as against Mrs. Tassin.

As the case as presented herein justifies and establishes the sufficiency and completeness of Mrs. Tassin's pledge, our original opinion should to that extent be maintained; but as the proof fails, in my opinion, to show that the Hymels participated in the agreement selecting DeJahan as a third person to take and hold the collaterals specified, the contract of pledge as to them is lacking a *vital element* to give it force and efficacy as to third persons and creditors of Pierre Lanaux—though it was perfectly good and valid as between the parties.

The Code requires that there must be an *actual* delivery to the

Succession of Thomson.

creditor or pledgee of the thing pledged. This is an essential to the completion of the pledge. It is the test of its efficacy.

But the Code states, as an exception to this general rule, that if the thing be placed and remain in the hands of a third person who is agreed upon by the parties, the privilege of the pledgee attaches to the thing pledged.

Having failed to participate in the agreement selecting DeJahan as custodian of the assets placed for the several accounts of the Hymels, their pledges were incomplete and they acquired no lien or privilege on said assets, and in this respect the opposition of creditors must be maintained, and to that extent our former opinion and decree should be amended, and as thus amended affirmed.

MR. JUSTICE McENERY concurs in this opinion with respect to the claim of Mrs. Tassin, but dissents from the views expressed as to other parties—maintaining the correctness of the original opinion of the court in its entirety.

46 1074
47 564
47 1164

No. 11,363.

SUCCESSION OF ADAM THOMSON.

1. The subscribers to the stock of the Citizens Bank of Louisiana, in subscribing not only subjected their property to mortgage, but incurred personal responsibility to the amount of the stock.
2. Proceedings against stockholders in enforcement of calls for contributions by means of executory process are in affirmance of the contract of subscription, and not proceedings of forfeiture, and they are governed by different rules as to their effects.
3. Any balance left unpaid on defaulted calls after sale of the stock and of the property mortgaged to secure it, made in executory proceedings, remains due by the subscriber, and an action lies to collect it.
4. The purchaser of the stock and property mortgaged to secure it, sold at a judicial sale made in enforcement of defaulted calls, is not responsible for the balance of the defaulted calls left unpaid after sale of the stock and property mortgaged.
5. The bank, in purchasing the stock and property mortgaged to secure the same, occupies no worse position than any other purchaser as to the unpaid balance on defaulted calls.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Henry Denis for Citizens Bank, Opponent and Appellant:

Subscribers to the capital stock of the Citizens Bank are personally liable for the amount subscribed. Charter of the bank and laws

Succession of Thomson.

amendatory thereof; Angell and Ames on Corporations, 10th Ed., p. 523; Morawetz Priv. Corp., Vol. 2, Sec. 56 *et seq.*; Waterman Corp., Vol. 2, Sec. 175; Cook on Stockholders, Sec. 69 *et seq.*

Act No. 100 of 1847 does not limit the terms and number of contributions to be paid by the stockholders of the Citizens Bank as it does for the Consolidated Association of Planters of Louisiana. Under the provisions of Act No. 79 of 1880 the Citizens Bank is authorized to compromise with some of its stockholders, and may refuse to compromise with others. Cook on Stockholders, pp. 199-211.

The subscriptions of stockholders forming the capital stock of a corporation constitute a trust fund for the security of the creditors, and can not be absorbed by the corporation, by purchase or otherwise, to the prejudice of the creditors. The subscribers are liable personally for the balance of their subscriptions after the seizure and sale of their shares of stock. Charter of the bank and laws amendatory thereof; Thompson's Liability of Stockholders, Sec. 205; 22 N. Y. 18; Cook on Stockholders, Secs. 125, 199, 312; 17 Wall. 610; Psychaud vs. Lane, 24 An. 404; Same vs. Hood, 23 An. 732; Brode vs. Insurance Co., 10 Rob. 440.

J. C. Gilmore Attorney for the Executrix, Appellee:

No action for personal liability for mortgage stock shares lies against owners of real estate subject to Citizens Bank mortgage stock; nor for any deficiency resulting from sales under executory process of said shares and mortgaged property subject to same to pay for calls or contributions levied or to be levied under the bank's charter. Citizens Bank vs. Miller, 44 An. 200; 45 An. 493; Morawetz on Corporations.

Where parties have bought property subject to said shares and paid stock loans assumed by them, the property is thereafter held by them as third possessors of mortgage property subject to said shares under Sec. 24 of the charter of the bank. *Ib.*

Where the bank has bought at sale under its foreclosure and executory process the said shares and mortgaged property, the owner is relieved from all liability by the forfeiture and sale of his

Succession of Thomson.

shares for any deficiency of proceeds of sale to pay calls. *Beach on Private Corporations*; *Morawetz on Corps.*; *Macauley vs. Robinson*, 18 An. 619.

The Citizens Bank of Louisiana has no action for personal liability for calls for said shares of stock against the original subscribers and consequently none against parties who have bought property subject to its mortgage stock shares for calls while in their possession. Its only remedy to liquidate stock mortgages for calls or contributions under Act 45 of March 11, 1873, is by executory process under the provisions of the said act, and its charter, or by compromise under Act 79 of 1880.

Hope & Co.'s agreement embodying the act of April 9, 1880 (*Record*, pp. 69-71), accepted the condition of things at the time it was made without reservation or distinction as to mortgage stockholders. *Morawetz on Corporations*, Vol. 2, Sec. 829, p. 800.

The agent of the bondholders can not refuse to accede to a compromise and enforce the foreclosure sale of the property subject to the shares to be assumed by the purchaser when the said shares are no longer of value, and after the said act and the funding of the bonds in the case of *Hope & Co.* Selling the property of the estate in this case on conditions of calls extending into the future, after offers of compromise and surrender of the property, closed the door to all competition at the sale, and was an injudicious and oppressive exercise of authority. *Bank vs. Heirs of Jorda*, 45 An. 188, No. 2.

A claim for calls or alleged deficiency to pay calls in such a case comes within the ruling of the court in the cases of *Planters' Consolidated Association vs. Lord*, 35 An. 425.

Carleton Hunt and *W. B. Summerville* submitted on Application for a Rehearing:

When the representative of a succession files an account, he is the plaintiff, and an opposition is in the nature of an answer. No further pleadings are necessary or allowable. *Succession of Romero*, 28 An. 607; *Succession of Planchet*, 29 An. 521; *Succession of Dugart*, 30 An. 270; *Succession of Mercier*, 42 An. 1138.

Succession of Thomson.

The State of Louisiana having been discharged from all obligations on its bonds issued in favor of the Citizens Bank by the judgment in the Hope case, it follows that the contributions levied upon stockholders of the Citizens Bank, under Act 45 of 1873, for the purpose of paying interest on said bonds, must fail and be without effect.

Act No. 100 of 1847 contains a contract between the State of Louisiana and the stockholders of the Citizens Bank, whereby, on the payment of the contributions provided for in that act, all liabilities of the stockholders of the bank on their subscriptions for stock are discharged. Consolidated Association of Planters of Louisiana vs. Lord, 35 An. 425.

The charter of the bank as amended by Act 45 of 1873, if it be really amended by said act, gives to the bank the right to enforce collections of contributions therein provided for, by executory process alone, and the bank can not legally exercise any other remedy than that the statute allows.

The obligation assumed by the subscribers to stock of the Citizens Bank is a real, and not a personal obligation. Bermudez vs. Union Bank, 7 An. 65; Citizens Bank vs. Levee Steam Cotton Press Company, 7 An. 287; Haynes vs. Harbour, 14 An. 238; Bangor House vs. Hinckley, 3 Fairfield (Conn.) 387; Bangor Bridge Company vs. McMahan, 1 Fairfield, 479; New Bedford and Bridge-water vs. Adams, 8 Mass. 141; the Charter of the Bank of 1833, Secs. 27, 28, 24, 3, 4, etc.; Amended Charter of Citizens Bank of 1836, Secs. 3, etc.

The opinion of the court was delivered by

NICHOLLS, C. J. This is an appeal from a judgment of the Civil District Court for the parish of Orleans, dismissing an opposition filed by the Citizens Bank to the account of the testamentary executrix of Adam Thomson, and homologating said account and authorizing and directing the distribution of the funds of the succession in accordance therewith.

The petition of opposition avers that Thomson was at his death, and had been for many years before, a stockholder of the bank, holding and owning eight hundred and fifty-four shares of the capital stock of one hundred dollars each; that the bank had made calls for contributions of seven hundred and eight dollars upon his shares

Succession of Thomson.

each year from 1881 to 1890, inclusively, which he neglected and refused to pay, said calls or contributions bearing by law interest at the rate of eight per cent. per annum from the 1st of December of each and every year.

That the aggregate of said contributions amounted to the sum of seventeen thousand and eighty dollars.

That Thomson was entitled to a credit on June 13, 1891, of eight thousand and forty dollars, the same being the proceeds of sale by executory process of the property mortgaged to secure the stock.

That Thomson's succession is still in debt to the bank in the sum of nine thousand and forty dollars, with eight per cent. per annum interest from the 1st of December of each year, from 1881, upon the said ten annual calls or contributions of seventeen hundred and eighty dollars.

The bank prayed for judgment accordingly, and that its claim be placed upon the account with interest, reserving the right of the bank to any future claims that it may have for the balance which will hereafter be due for contributions on the eight hundred and fifty-four shares of stock.

The executrix excepted to the demand and opposition on grounds not necessary to be here specially enumerated, as they were renewed in the answer afterward filed. The exceptions were permitted to be filed and argued as such, on the trial of the merits of the opposition.

The grounds of defence of the executrix are substantially:

1. That the subscribers to the capital of the bank have contracted no personal obligation to pay the amount subscribed for, and they have only bound their property by mortgage.
2. That the ruling of the Supreme Court in the case of the Consolidated Association of the Planters of Louisiana vs. Lord, 35 An. 425, applies to this case, and shows that the subscribers of the Citizens Bank are equally exonerated.
3. That the bank has no right to compromise with some of its mortgage stockholders, and not with others.
4. That the right of the bank to claim the contributions already due by a stockholder is lost when she has caused the shares of such stockholder to be seized and sold, and has bought them in.

On the trial of the opposition the bank waived the reservation it had made in its petition of opposition to the right to demand future

Succession of Thomson.

contributions from the succession, admitting "that it made no claim for any contributions that have been raised or would be raised after the stock of Adam Thomson had been seized and caused to be sold by the sheriff at the instance of the bank in its suit."

The District Court rendered judgment dismissing the opposition of the bank at its costs, and approving and homologating the account filed and ordering the funds to be distributed accordingly.

The bank appealed.

Plaintiff's contention that in subscribing to the Citizens Bank stock the subscribers merely subjected their property to mortgage and incurred no personal liability is not well founded. In *Cuculu vs. The Union Insurance Co.*, 2 Rob. 577, this court said:

"A person who with others signs an agreement or promise to take stock in an incorporated company thereby promises to pay the corporation the sum necessary to cover every share set opposite his name, and an action will lie to recover it. This point has been repeatedly decided both in England and the United States, and rests upon the plainest principles of law and justice. * * * It is not to be permitted to any number of individuals to get up incorporated companies for insurance, banking or other operations, and, after enabling them to get into debt, to throw the loss upon the creditors by refusing to pay their stock or forfeiting it, or dissolving the corporation and releasing themselves by non-user."

Cook says (Sec. 71): "A subscription for shares implies a promise to pay for them, and this promise sustains an action to collect;" and he adds (Sec. 72): "This rule prevails in regard to subscriptions taken before incorporation as well as after incorporation." There is no question in this case of any implied promise; the promise is absolute and express and the right of action to collect by personal action unquestionable.

We see nothing to take this particular subscription out of the general rule, and the evidence in the record establishes that Adam Thomson, when he purchased the shares of stock referred to herein and the property mortgaged to secure the same, assumed all the obligations of a shareholder in the bank. His personal obligation as resulting from his purchases from the Bishops is equally clear. We do not understand the executrix to question the amount of the calls, the necessity for the same, or the regularity of the proceedings taken to enforce them. On the contrary, she sets up those proceedings and

HARVARD LAW LIBRARY

Succession of Thomson,

the sale made under them as a defence, claiming that by reason thereof the succession of Thomson has been released from all liability.

She invokes in favor of this position the doctrine laid down in Cook, Secs. 127 and 128, that "forfeiture of stock relieves the shareholder whose shares are forfeited from liability to corporate creditors," claiming that the seizure and sale of the stock and the property mortgaged to secure it in enforcement of the demand for calls operated a forfeiture of the stock, and that the corporation by becoming the purchaser of the stock and the property mortgage had assumed and rendered itself liable for all the obligations resulting from the subscription, thereby releasing the succession of Thomson.

In referring to the various remedies of which a corporation can avail itself against its non-paying stockholder, Cook (Sec. 121) says: "When a subscriber fails or refuses to pay for the shares of stock for which he has subscribed, the corporation generally has several methods of enforcing the contract. First, there is the common law action to collect the subscription as a debt. This remedy always exists except in a few States, where it is available only when the subscription itself or the charter creates a liability to pay; second, the corporation may sue on the subscription, obtain judgment and then proceed to sell the stock under an execution levied to collect the judgment; third, the corporation may bring an action at law for breach of contract, the measure of damages being the difference between the value of the stock at the price which the subscriber was to pay and the market value at the date of the refusal to pay. A fourth and very important remedy is that of forfeiture. It is effected in one of two ways: the forfeiture may be by a strict foreclosure of the stockholder's stock—that is, by the taking of his stock by the corporation itself, or it may be by a public sale of the stock for non-payment of the subscription."

After a discussion of these various remedies and their effect, the author proceeds to say: "There is a class of cases where it is held that a forfeiture of shares of stock is like the foreclosure of a mortgage, and that just as a mortgage may have judgment against the mortgagor for a deficiency, so may a corporation have its action of *assumpsit* against a subscriber whose stock having been forfeited has failed to sell for enough to pay his entire indebtedness to the corporation on the subscription. This rule is held to apply equally to original subscribers or their transferees, and any stockholder is lia-

Succession of Thomson.

ble under this rule for the *balance due upon assessments* after deducting the amount realized at the forfeiture sale."

We are of the opinion that the Citizens Bank having made legal calls upon the succession of Thomson which were not responded to, the judicial proceedings taken by the bank were by way of direct enforcement of the contract and not by way of forfeiture. And, therefore, the rules relative to forfeitures are not applicable to this case.

We are next to inquire what was the effect from other standpoints upon the rights and obligations of parties of the adjudication made to the bank. The matured unpaid calls due by the succession at the time of the adjudication amounted to seventeen thousand and eighty dollars. The stock with the property mortgaged sold together for eight thousand and forty dollars, so that after exhaustion of the mortgaged property there remained a deficit upon the DEFAULTED CALLS of nine thousand and forty dollars. Would a third party purchasing the stock and property at this sale have been responsible by reason of thus becoming owner of the stock for this deficiency upon the calls? We think not. In cases of transfer by conventional sale Cook declares that the transferror is liable for calls payable before the transfer is made, and in some cases for calls made before, but payable after the transfer, and he cites in support of this position, among others, a Louisiana case, that of the Vicksburg, etc., R. R. Co. vs. McKean, 14 An. 724 (see Cook, Secs. 255 and 258 and notes). To the same effect in Sec. 418 he says: "The transferror is bound to pay all calls made before the transferee purchases."

The purchaser at a judicial sale occupies no worse position, and in our opinion matters are not varied by the corporation itself becoming the purchaser. The situation is that to which reference is made in the citation from Cook, Sec. 126. The adjudication left the stockholder responsible for the balance upon the matured assessments or calls after deducting the amount realized from the sale. The bank claims nothing more than this.

The decisions in the matter of the Consolidated Association of the Planters of Louisiana rested upon the special facts connected with the affairs of that association. As it is entirely separate and distinct from the Citizens Bank the plea of *res judicata* has no force.

The executrix urges that it would be against good conscience to permit the bank to recover in this case, as though it has made numer-

Succession of Thomson.

ous compromises of indebtedness with other stockholders it has declined to compromise with the succession she represents. She not only made no defence against the propriety and legality of the calls when made and the proceedings in their enforcement, but she sets up in this suit, as we have said, the proceedings heretofore taken as having released the succession from all liability. Questions as to the calls are not properly before us. All that we are called on to say is whether defaulted calls having been enforced resulting in a purchase by the corporation of the stock and mortgaged property, but leaving a balance due upon the stock, the succession is legally responsible for that balance. If it is, then the bank has the right to a judgment in the premises. Whether the compromises referred to have or have not resulted or will result in unjust discrimination among stockholders is a matter which we would be unable to dispose of from the record even if the issue were properly before us. A thorough knowledge of the entire situation of the bank and the accounts of all the stockholders would be necessary to reach correct conclusions. It is quite possible that the most liberal concessions made to other parties have resulted in larger actual *pro rata* payments from them on their stock than have been or ever will be made by the succession of Thomson. If the succession should suffer injury the remedy is not that sought to be applied here.

Referring to enforced payments upon stock Cook, Sec. 211, says: "Corporate creditors compelling stockholders to pay their subscriptions are under no obligation to see that the payments made by the subscribers are proportionately equal. A court of chancery will compel subscribers to pay in full the amount of their unpaid subscription if the corporate indebtedness make it necessary, leaving them to seek contribution from the other shareholders. The rule, moreover, is well settled that a shareholder who has been compelled to pay more than his proportion of the debts may maintain his action against his co-stockholders for contribution."

In Haynes, Liquidator, vs. Kent, 8 An. 132, which was an action to enforce calls made against a stockholder this court said: "The defendant stands as any other partner in a joint stock company and is bound to pay, when regularly called upon, the share of the capital which he agreed to pay. He is in no sense a joint debtor of the corporation. His obligation, on the contrary, is several and entirely unconnected with those of the other stockholders. He owes the amount of his

McNeely vs. Hyde.

subscription whether they pay or not, and nothing beyond that amount can be claimed of him under any circumstances."

Whilst we refer to these authorities we are not called on, as we have said, to express—nor could we from the data in the record—any opinion as to whether the succession has been discriminated against or not, and if so what its precise course should be.

After consideration of the different grounds of defence set up, we have reached the conclusion that they are not well founded.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the Citizens Bank of Louisiana, against the succession of Adam Thomson, for the sum of seventeen thousand and eighty dollars, being the aggregate amount in principal of the calls made each year from 1881 to 1890, both inclusive, under the charter of the said bank and the laws relative thereto, upon the shares of stock in said bank owned by Adam Thomson, with interest at eight per cent. per annum on each annual call from the 1st of December of the year each call was made until paid, subject to a credit on the 13th day of June, 1891, of eight thousand and forty dollars, the same being the proceeds of sale by executory process of the shares of stock and property mortgaged to secure the same, and that this judgment be placed upon the account of the executrix. It is further ordered that the succession of Adam Thomson pay the costs in both courts.

Miller, J., recused.

Rehearing refused.

No. 11,459.

MRS. M. L. MCNEELY VS. JAMES H. HYDE.

M. RYAN AND T. J. HICKMAN ET AL., WARRANTORS.

Matters once determined by a court of competent jurisdiction, if the judgment has become final, can never be called in question by the parties or third persons.

It matters not under what form the question be presented, whenever the same question recurs between the same parties the plea of *res adjudicata* estops.

A PPEAL from the Fourth Judicial District Court, Parish of Grant.
Ware, J.

46	1088
108	611
46	1083
119	919

McNeely vs. Hyde.

W. C. Roberts Attorney for Plaintiff and Appellee:

ON MOTION TO DISMISS APPEAL.

Unless the allegations of the petition show affirmatively that the amount in dispute exceeds two thousand dollars the appeal will be dismissed. 39 An. 113, *Hite vs. Hinsel*; 35 An. 311.

When the allegations of neither party show that the amount in dispute exceeds the lower limit of the appellate jurisdiction the appeal will be dismissed *ex proprio motu*. 35 An. 496.

ON PLEA OF RES JUDICATA.

The title to property having been once passed upon is *res judicata* between the parties to the suit and their privies. 22 An. 81, *M. A. Leatts vs. Heirs of Williams*; 30 An. 838, *Compton vs. Sanford*.

The plea of *res judicata* prevails as to all parties and their privies in the suit where the judgment was rendered, notwithstanding there may have been other parties to the suit. 30 An. 576, *Ledieux vs. Barton*.

A vendee acquires no better rights than his vendor had. 10 An. 570, *Dusson vs. Beller*; 1 Rob. 87, *Oliver vs. Stephens*.

Matters once determined between parties and privies can never be passed upon between them again. 43 An. 941, *Broussard vs. Broussard*; 34 An. 805.

The verdict of a jury in a civil case has the force of the thing adjudged on the issue passed upon. 38 An. 570; 19 La. 318.

This plea is to be determined by the issues raised by the pleadings and the judgment rendered. 35 An. 554; 17 La. 92; 7 N. S. 430.

The plea of *res judicata* may be presented in any form of pleading, and whenever the same question recurs between the same parties or their privies it estops. 44 An. 289; 35 An. 553.

PRESCRIPTION OF THIRTY YEARS.

A title acquired at a sheriff's sale prevails until set aside by a direct action. 41 An. 1135; 24 An. 445.

Prescription based on title is coextensive with limits of title. R. C. C., Arts. 3498, 3437; 11 An. 471; 1 Rob. 159.

Possession once commenced continues by intention. 9 An. 155; R. C. C., Arts. 3442, 3443, 3444.

McNeely vs. Hyde.

A possessor who proves that he has formerly been in possession shall be presumed to have been in possession in the intermediate time. 24 An. 453; 16 La. 10.

Possession of cleared land is possession of woodland adjoining on the tract. 37 An. 751.

A confirmation by Congress of a Spanish grant is a prescriptible title. 40 An. 710; 5 An. 647.

ON CONFIRMATION OF SPANISH GRANT.

Lands which passed into private ownership previous to the treaty of cession between the two governments are not subject to control of the United States. 40 An. 710; 15 An. 673; 5 An. 647.

One having no title to the lands when confirmed can not contest the confirmation. It is conclusive. 14 An. 98.

Possession under a *requete* conferred title in a Spanish subject, *a fortiori* would possession under an order of survey. 3 An. 59.

A confirmation dates back to the time claimant filed his claim, and is not defeated by an entry of the United States government, even before the confirmation. 9 An. 157.

A government map returned by the surveyor general without notice of private claim does not defeat the rights of the confirmer. 9 An. 102-3.

A confirmation by Congress for a certain number of acres on a particular stream, founded upon an order of survey, is a complete title. 4 An. 482, Fay vs. Chambers.

A survey by the government is not necessary to complete a title to a confirmation, unless the claim is confirmed as a floating claim. 9 An. 108.

Parol evidence is admissible to prove contents of deed when the original is shown to be lost or destroyed.

The recitals of an authentic act estop the parties thereto. 28 An. 107; 15 An. 684.

Robt. P. Hunter Attorney for Defendant and Appellant:

Where United States patents are issued for land prior to the definite location and survey of a Spanish grant, the patents are the superior title and must prevail. 11 La. Rep. 323, 587; 3 Rob. 293; 6 Rob. 139; 96 U. S. 530; 2 Wallace, 525; 7 An. 546; 11 An. 561; Act of Congress to same effect.

McNeely vs. Hyde.

Parol evidence will not be received to prove title, unless the loss of the original and the non-existence of a copy is first shown. 39 An. 94; 45 An. 451.

By offering titles and asking a judicial investigation of them, the plea of *res adjudicata*, based on a part of the same titles, is waived and renounced. The offerings and the plea are inconsistent and can not stand together.

In a petitory action it is sufficient to defeat the action for the defendant to show a valid outstanding title in any one but plaintiff.

To support the plea of *res adjudicata* it must be shown that the two suits are between the same parties, in the same capacities; that the cause of action is the same, and that the thing adjudged is the same. All doubts are to be construed against the plea. 43 An. 216.

Where, in sales and mortgages, the property sold and mortgaged is described so vaguely and indefinitely that it is impossible to locate the land by the description given, such sales and mortgages are null and void for want of description of the property.

A Spanish grant described as "a tract of land of twenty arpents front by forty arpents in depth, equal to six hundred and seventy American acres, situate on the Rigolet du Bon Dieu, in the parish of Natchitoches," could not be validly sold or mortgaged by this description, prior to its definite survey and location. Particularly where it is shown that the Rigolet du Bon Dieu in Natchitoches parish was then sixty or seventy miles in length.

Jno. C. Ryan Attorney for M. Ryan, Warrantor, Appellant:

The plea of *res adjudicata* is *stricti juris*, and must be established beyond question, and all doubts enure to the benefit of the party against whom it is pleaded. 43 An. 214.

R. J. Bowman Attorney for Hickman, Warrantor, Appellant:

The mere confirmation of a claim without location is not good against land sold by the United States and patented. 18 Howard, 473; 11 La. 587; 11 An. 561; 7 An. 546.

A judgment of the Supreme Court is often the reverse of the judgment of the District Court, and therefore the pleading of a judg-

ment of the Supreme Court as *res judicata* is not pleading the judgment of the District Court.

Evidence is not admissible to prove what is not alleged, nor will the judgment of the District Court, as evidence, sustain the pleadings of *res judicata* of the Supreme Court.

A record made up of extracts from a record in the Supreme Court is a mutilated record and not admissible in evidence.

The defendants in *Hickman vs. T. J. Wells et al.* are not legally the same as the plaintiff in this suit. She does not allege or prove that she derived the title she sets up from or through them.

On the contrary, the title by which she alleges herself to be owner is antagonistic to and inconsistent with the title adjudged to the defendants in the suit of *Hickman*.

A judgment sustaining a title can not be invoked as *res judicata* to sustain a title to which it is antagonistic and destructive.

The identity of the land in controversy with the land adjudged to T. J. Wells, Hughes and Bailey in the suit of *Hickman* is not shown.

In questions of *res judicata* every doubt is construed against the plea. Toul. 10, Sec. 157; 43 An. 216.

A possessor in good faith, if evicted, owes rent only from the time the thing is claimed by the owner. C. C. 3416.

A possessory action is not a claim of the thing by the owner.

A fortiori, a possessory action in which the plaintiff fails does not make the possessor in good faith a possessor in bad faith or responsible for rent until the thing is claimed in a petitory action by the owner.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. Plaintiff and appellee shows to the court that the amount in dispute is below the lower limit of its jurisdiction, and for that reason the appeal should be dismissed.

The demand of the petition—and the prayer is to a like effect—is for the recovery of a tract of land valued at twelve hundred dollars, for the value of timber cut and removed, two hundred dollars, and for the rental value of the cleared land at the rate of two hundred and fifty dollars per annum, from 1889 to the date suit was instituted, August 18, 1892.

McNeely vs. Hyde.

A simple calculation shows that the amount in dispute is something over two thousand dollars and consequently this court has appellate jurisdiction.

The motion is, therefore, overruled.

ON THE MERITS.

The plaintiff claims to have inherited the property in controversy, in common with her brothers and sisters, from her father, Littleton Bailey, who died in 1861, and from her mother, Frances J. Bailey, who died in 1867, and that she subsequently inherited the interests of her brothers and sisters, all of whom have since died without issue.

To the title she claims by inheritance, she adds that she has acquired by the prescription of thirty years; and in this court she sets up the prescription *acquirendi causa* of ten years, as possessor in good faith.

She claims to have thus acquired title to a tract of land on the left bank of Red river descending, having a front on said river of twenty arpents, by a depth of forty arpents, which tract of land is known as the Juan de Leon Spanish grant, containing six hundred and eighty-three and 44-100 American acres, and embracing Spanish sections 37 and 38, in township 6 north, of range 4 west; Spanish section 37, in township 6 north, of range 3 west; Spanish sections 45 and 46, in township 7 north of range 4 west, and Spanish sections 37 and 39 and 40, in township 7 north, of range 3 west, as per survey made by George S. Walmsby, Deputy United States Surveyor, in 1847 and 1848, said property being known as Rock Island plantation.

Petitioner represents that the claim of title by which her said parents became the owners of said land is as follows, to-wit: That said land was granted to Juan de Leon, by virtue of an order of survey given by Governor Miro, Spanish Governor at New Orleans, on the 8th of August, 1790, same then being situated in the parish of Natchitoches, as will appear by reference to a certified copy of the report of D. T. Sutton, Register of the Land Office for the district in Louisiana north of Red river, made on 6th of January, 1821, pursuant to an act of Congress of date May 11, 1820; which Spanish grant was, on the 28th day of February, 1823, confirmed as a valid Spanish grant, as against any claim on the part of the United States gov-

McNeely vs. Hyde.

ernment, and the title of the said Juan de Leon thereto recognized to be good and valid.

Petitioner further represents that under the treaty by which the United States acquired the territory of Louisiana, tracts of land previously granted to a Spanish subject were permitted to remain the property of such subject, and such Spanish grants were afterward confirmed by an act of Congress, which put at rest any question of their validity.

Petitioner further represents that the order of the Spanish Governor, Miro, at New Orleans, in 1790, was prior in date to the cession of the territory of Louisiana to the United States in the year 1808.

She then sets out with precision the chain of title whereby her father and his authors acquired the ownership of said Spanish grant, as follows, to-wit: That her father, Littleton Bailey, acquired same from James Bowie and Juan de Leon, on or about the 1st of December, 1832, and January 8, 1836, respectively, by certain acts of sale referred to as of record in the parish of Natchitoches. That Bowie acquired the title which he conveyed from Juan de Leon by an act of sale of date December 15, 1818, likewise duly recorded. That on the 1st of December, 1832, her father conveyed to T. J. Wells an undivided half interest in said property, retaining a mortgage to secure the price, likewise recorded.

That on the 9th of February, 1838, T. J. Wells conveyed same to J. Madison Wells. She further represents that, on the 24th of February, 1838, J. Madison Wells purchased from W. H. T. Bynum the title he had acquired from Andrew Hunt Adams on the 31st of March, 1835, who it appears acquired a title from Juan de Leon on the 26th of March, 1835. She further represents that on the 25th of January, 1839, J. Madison Wells executed a mortgage on said property in favor of the Canal Bank, under which same was subsequently sold on the 6th of May, 1848, and at said sale the property was adjudicated to John K. Elgee, and he subsequently conveyed same to J. Madison Wells in 1859, who, during the same year, conveyed it to the petitioner's mother, Frances J. Bailey.

She then finally avers that both of said deeds—that is to say, the one from Elgee to Wells, and that from Wells to her mother—were *destroyed* by the burning of the court house in Rapides parish in 1864.

From the foregoing statement, it is clear that prior to February 23, 1838, plaintiff's father was full and exclusive owner of the entire

McNeely vs. Hyde.

grant, and so remained with respect to an undivided one-half interest until the time of his death—unless his title was divested by the Bynum title. But conceding that, for the argument, and under the statement of plaintiff, the Bynum claim of title passed through the two Wells' to her mother, and she being the sole heir to the estates of her father and mother, and of her sisters and brother, the entire title was united in her. That in addition she has ten and thirty years' prescription. This statement appears to be clear, and must become conclusive on the production of the titles.

So much for the grant itself.

Petitioner further avers that in 1889 the defendant, Hyde, took illegal possession of a portion of said tract of land—the portion including Spanish sections 45 and 46, aggregating about one hundred and twenty-nine acres, and refuses to surrender the same, and hence the necessity for this suit; and she accompanies her other demand with one for the value of timber cut and removed, and for the rental value of the cleared land.

This is the real gist of this suit.

Finally, petitioner supports her claim of ownership with the plea of *res adjudicata*, as follows, viz.:

“Your petitioner further shows that in a suit styled L. Bailey and Wells vs. T. J. Hickman, reported in 12th La. 415, 416, and in a suit styled T. J. Hickman vs. L. Bailey, 9 An. 485, the title of the Juan de Leon grant was in controversy, which causes were decided by the Supreme Court (to which tribunal same had been appealed) in favor of said Bailey, and of his heirs, and she pleads (same) as *res adjudicata*.”

Substantially, the answer of the defendant, Hyde, is that he is a good faith possessor under a title from M. Ryan, and entitled to fruits and revenues up to date suit was instituted; and he calls Ryan in warranty.

The answer of this warrantor is similar in purport, he claiming under a title from the Hickman brothers, in 1888; and he calls the Hickmans in warranty.

The latter answer, setting up their title by inheritance from their deceased father, Thomas J. Hickman, who obtained title from the United States; that is to say, by a certificate of entry of the east half of the southeast quarter, section 36, township 7 north, of range 4 west, on the 15th of May, 1835; and by patent, of the southwest

quarter, and west half of the southeast quarter of same section, township and range, in 1837—same covering the land in suit.

They further aver that the Juan de Leon grant was never surveyed or located by the United States, and that the United States had not parted with its title at the time the land in controversy was sold to their ancestor; and that without survey and location of the Juan de Leon grant prior to sale to him, it could not be *subsequently* located so as to divest said ancestor's acquired rights.

On these pleadings and issues there was judgment in favor of the plaintiff on the question of title, sustaining her plea of *res adjudicata*, and awarding her judgment for seven hundred and twenty dollars as the rental value of sixty acres of cleared land for a period of three years; and in favor of the defendant for eight hundred dollars for clearing land, and five hundred and thirty-four dollars and ninety cents for the construction of buildings, etc.

There was judgment against each of the warrantors, and from these various decrees the defendant and warrantors have appealed.

In this court the appellee seeks an amendment of the judgment, rejecting defendant's claim for improvement, on the ground that he is a possessor in bad faith, or that, in the alternative, his claim therefor should be reduced to a reasonable sum.

The judgment of the court below did not award to the plaintiff anything on the score of timber cut and removed; and, as no amendment has been requested on this score, it may be treated as abandoned.

It is, therefore, clear that, in respect to the title, the only question raised on the pleadings is as to which is the better title, the Juan de Leon grant, or the United States Register's certificate of 1835, and government patent of 1837; and that to this question we must apply the decision of this court relied upon as forming *res adjudicata*.

But, a question incidental to the discussion of the plea of *res adjudicata*, is whether the plaintiff has properly connected herself with the title to the Juan de Leon grant; for, otherwise, proof of the plea would be inadmissible.

It appears that there is no written title in the record showing a conveyance of the property from Elgee to J. Madison Wells, and from Wells to the mother of plaintiff, as alleged in the petition.

Plaintiff's theory in regard to these missing documents is that the originals were destroyed by the burning of the court house at Alex-

McNeely vs. Hyde.

andria, in 1864; and that she was entitled to offer secondary evidence of their contents. To the offer of the parol evidence of J. M. Wells for that purpose, defendants' and warrantors' counsel objected, on the following grounds, viz.:

"That it is not the best evidence; that it is not alleged or proved that a copy of the original was not in existence, nor could be obtained. It is not shown that there is no record of this deed in the parish of Natchitoches, in which this land was situated at that time, and where the plaintiff shows all of his other deeds were recorded and where a copy of the deed might have been found."

The rule of law on this subject is, that "when an instrument in writing, containing obligations which the party wishes to enforce, has been lost, or destroyed by accident or force, *evidence* may be given of its contents," etc. R. C. C. 2279. But this article does not place upon the evidence the limitation that is suggested in the exception. Other articles of the Code declare that a *copy* of an act "is good proof, and supplies the want of the original," in case "the *loss* of the original be previously proved." *Id.* 2269.

The *record* of an act is likewise receivable in evidence "on proving the *loss* of the original," etc. *Id.* 2270.

Our conclusion is that neither an examination of the record, nor an effort to find a copy of these two conveyances extant, was a condition precedent to the introduction of parol testimony of their contents; and that the judge *a quo* properly overruled the objections urged and admitted the evidence—thus completing plaintiff's connection with the Juan de Leon grant.

On the trial in the lower court, plaintiff offered in evidence certified extracts from the record of the case of T. J. Hickman vs. L. Bailey *et al.*, No. 2808 of the docket of this court, 9 An. 485—the case plaintiff relies upon as forming *res adjudicata*—which were objected to by the defendant and warrantors, on the ground (1) that the judgment and verdict of the lower court were not plead as *res adjudicata*, and proof of same is inadmissible; and (2) that the document offered is not a full and complete copy of the aforesaid record, and a *part* thereof is inadmissible.

These objections were overruled and the testimony admitted, the objectors retaining a bill of exceptions.

We think the judge's ruling was correct. Inasmuch as the judgment of this court was pleaded as *res adjudicata*, it is evident that the

record of this court had to be consulted on the subject, and this necessitated its production. That this record included the proceedings in the lower court is evident, and that they included the verdict of the jury and the judgment of the lower court is equally evident. In this respect the testimony is unobjectionable and conforms to plaintiff's plea.

As to the objection that only *extracts* from the record were offered, in lieu of a full and complete record, it only goes to the effect and not to the admissibility of the evidence. And an inspection of the certified extracts in evidence exhibit a full and complete record of the case on appeal, less the opinion of this court and one or two exhibits—the former appearing in the published reports, of which this court will take cognizance, and the latter being merely a matter of evidence, not determinative of the plea of *res adjudicata*. They contain the pleadings, minutes of court, finding of the jury and judgment thereon based, and the proceedings incident to an appeal to this court. These are all the essentials to an examination and decision of the plea of *res adjudicata*. The objections were properly overruled.

It is manifest that the judgment and decree of this court, which is set up as *res adjudicata*, necessarily embraces the verdict and judgment of the lower court as an essential and integral part thereof.

It was held in *Beaird vs. Russ*, 84 An. 315, that an appeal is not an independent suit, but an incident, merely, of the original suit, and the continuation of it.

The original suit in the lower court and the appeal are the same action without any substantial change.

In *Shakspeare, Smith & Co. vs. Ware*, 38 An. 570, it was held "that the rule as to the verdict of the jury, like a judgment, is that it forms the authority of things adjudged upon all matters and demands set up in the pleadings."

But the judgment of this court does not rest on the verdict of the jury, simply and alone, but upon a definitive judgment of the District Court, which was based upon the verdict of the jury. The judgment of this court dismissed the plaintiff's appeal, because he had not cited the warrantors as appellees. Hence it was the result of this judgment of dismissal, which put an end to the case, by leaving the judgment of the lower court in force. It would be impossible for this court to determine what force and effect are to be

McNeely vs. Hyde.

given to the judgment rendered without consulting the judgment that was appealed from. The plea of *res adjudicata* embraces the verdict of the jury and the judgment of the District Court thereon based; and in determining whether the bar of the judgment of this court is complete, same must be taken into consideration.

Looking into the opinion of this court in the case of *Hickman vs. Bailey*, 9 An. 485, we find the following statement of facts, viz.:

"The plaintiff claims the ownership of several tracts of land described as being situated on the Rigolet du Bon Dieu, in the parish of Natchitoches, under titles derived from the government of the United States. He alleges that the defendants have entered upon and taken possession of this land, and claim to be the owners of the same by virtue of a pretended title derived from Juan de Leon, which title they represent to be fraudulent and as never having been located by the proper authority under the government of the United States.

"The defendants, Bailey and Hughes, in answer, aver that they hold by good and valid titles derived, as to the defendant Hughes, from Littleton Bailey, who derived same from Juan de Leon, the grantee, under the Spanish government; that said grant was confirmed by the government of the United States, and was located by the officers thereof. They aver that they purchased from their respective vendors in good faith and for a valuable consideration, and in case of eviction are, therefore, entitled to improvements, etc.
* * * That the heirs of the late James Bowie are bound in warranty to them and pray that they may be accordingly cited, and in case of eviction that such judgment be rendered against said heirs in their favor as may be legal and just. The other defendants, Thomas and Wells, claim also under said Bailey.

"The heirs of Bowie being cited also joined issue and denied any liability as warrantors.

"The case was submitted to a jury in the court below and from the judgment rendered on their verdict in favor of defendants the plaintiff has appealed."

The court coming to consider the case dismissed the appeal on the motion of appellee's counsel, grounded on the plaintiff's failure to cite the warrantors as appellees.

From the foregoing statement by the court it is evident that the issue in that case was, as it is in this, which is the better title to the land, the Juan de Leon grant or the certificate and patent of the

United States—the land in controversy in this suit constituting an integral part of that involved in that suit.

There is no doubt of the fact that the Littleton Bailey who figures in the former case as defendant is the same person who figures in the deeds which the plaintiff introduced in evidence, as the source of her title by inheritance; and there is likewise no doubt of the fact that the T. J. Hickman who is plaintiff in that suit is the ancestor of the warrantors, Hickman, in the instant case and the author of defendant's title. It is likewise an undoubted fact that the title under which the plaintiff set up claim in the former case is the same identical patent and certificate from the United States government under which the defendant and warrantors claim in the instant case; and it is equally true and undoubted that the plaintiff in the instant suit claims under the same Juan de Leon grant that the defendants claimed under in the former case.

There can be no reasonable doubt or question of the efficacy and completeness of the bar of *res adjudicata* that is formed upon the judgment that was rendered in that case, if the plaintiff has properly connected herself with the Juan de Leon grant, in point of fact, as she has in allegation. And for this purpose it will be necessary for an investigation to be made as a means of ascertaining from the record what was the *status* of the title to the Juan de Leon grant at the time suit was brought on the 21st of December, 1845.

It appears from the record that Juan de Leon conveyed the land covered by his grant to James Bowie, on the 18th of December, 1818. That Bowie conveyed to Littleton Bailey, on December 1, 1832. That on the same date Bailey conveyed one-half interest to T. J. Wells; that on the 9th of February, 1838, T. J. Wells conveyed his one-half interest to J. M. Wells; that on the 8th of January, 1836, Juan de Leon executed an act of sale of the entire land to Littleton Bailey—the act reciting that the title he had executed to James Bowie on the 15th of December, 1818, to the same land “has been declared null and void in consequence of informality.”

It also appears from the record that Juan de Leon executed a title to the same property to A. H. Adams, on the 26th of March, 1835—prior in date to his deed to Bailey, on the 8th of January, 1836. That Adams conveyed to Bynum on the 31st of March, 1835, and Bynum conveyed to J. M. Wells, on the 24th of February, 1838. That on the 25th of February, 1839, J. M. Wells executed a mort-

McNeely vs. Hyde.

gage on the *whole* property in favor of the Canal Bank, and same was foreclosed and the property adjudicated to Elgee on the 23d of March, 1848. Thus it will be seen that, at date the suit of Hickman was filed, in 1845, the title was either in J. M. Wells, who had derived title to part from T. J. Wells, or to the whole by a title from Bynum; or it was in Littleton Bailey and J. M. Wells, in joint ownership. The parties defendant in that suit were Littleton Bailey, Thomas J. Wells and John J. Hughes; and it was by the plaintiffs averred that the defendants were in possession, claiming ownership "by virtue of a certain pretended title derived from Juan de Leon, which petitioner avers to be fraudulent, and that it has never been located by the government," etc; and judgment was prayed for against them, condemning them to deliver up the property.

The defendants, Bailey and Hughes, appeared and answered, and averred that they held good and valid titles to the property, "derived, as to the defendant Hughes, from Littleton Bailey, who derived the same from and through the original grantee thereof from the Spanish government, to-wit: Juan de Leon." And they further answered and averred that the title under which they claim "is superior to that set up by the plaintiff. That the government of the United States had no right to dispose of the land by sale, if it is true that it did dispose of it."

They further represent "that James Bowie was bound to them in warranty, as the deeds filed herewith will show. That he is now deceased, and that his heirs are bound to them in warranty;" and they pray that they be cited in warranty—enumerating them and giving their places of residence.

Thomas J. Wells appears and answers by setting up a title derived from Littleton Bailey, and averring that the title under which Bailey holds is superior to that of the plaintiff—following, in substance, the answer of Bailey and Hughes. It was on these issues that the verdict of the jury was rendered in favor of the defendants, and thereon a final judgment was rendered, quieting them in their title and fully recognizing them as owners under the Juan de Leon grant—the judgment formally declaring "that said lands, thus decreed to the defendants, being so much of the land claimed in the patents set up in the plaintiff's petition as are covered by and found within the limits of the Juan de Leon confirmation and location, as are represented on plats numbered 13 and 72, filed in this cause."

In reply to the objections of plaintiff's counsel to the motion to dismiss the appeal the court employed this language, to-wit:

"It appears that on the 1st of December, 1882, James Bowie conveyed to L. Bailey a tract of land, a part of which constitutes the subject matter of this litigation, for the price of two thousand dollars. The deed of sale contains the usual clause of warranty. But it is urged by the appellant that the heirs of Bowie have no real interest in the matter, and are not bound in warranty, and ought not to have been cited as such, inasmuch as the title relied upon by the defendants does not emanate from Bowie, but purports to come from Juan de Leon. In *May, 1834*, it appears that Bowie wrote to Juan de Leon, his vendor, that there existed some defect in the conveyance made to him in December, 1818, which he would discover from a copy which he sent, *and requested him to renew the deed in favor of Bailey*, the bearer of the letter, in such manner as should be satisfactory to both of them, which was done, de Leon stipulating the same price as that contained in his deed to Bowie. It is on this that the appellant relies to sustain his position. But it is far from being clear to our minds that this circumstance is entitled to produce the effect contended for, the extinguishment of the obligation of warranty of James Bowie, as vendor of Littleton Bailey. "Instead of lessening or impairing, it would seem to increase the warranty, or to be an additional security to the purchaser." Or, in other words, the deed of Juan de Leon to L. Bailey in 1836 was, in effect, a confirmation of Bowie's previous title to Bailey. It was not, in the opinion of the court, a *new* title intended to destroy the effect of de Leon's previous conveyance to Bowie, but to make formal and effective the title he had conveyed to him in 1818. It had a direct tendency to defeat the title he had made to Adams in 1835.

On this theory both the plaintiff and defendants in that suit proceeded; and that theory is perfectly reconcilable with the citation of Bailey and Wells as owners, and plaintiff's failure to cite Adams or Bynum. It is consistent with the answers of the defendants and warrantors therein. This deed from Juan de Leon to L. Bailey being intended to correct an *informality* in the title of de Leon to Bowie, under whom Bailey held. But if it was a fact—a fact unknown and not recognized by these parties at the time—that the Adams-Bynum title was a better title than that of Bowie to the Juan de Leon grant,

McNeely vs. Hyde.

it passed subsequently through one of the defendants to the mother of the present plaintiff, though the judgment of the court, in the case of Hickman vs. Bailey, did not take formal cognizance of it. The court passed upon and decided the main controversy, and held that the de Leon grant was a better evidence of title than the subsequent government patents; and we do not consider it of any importance that parties claiming under the Adams-Bynum title were not made parties, as they were evidently without interest, on the theory which was entertained by the court.

We do not, therefore, consider it important to discuss that question further in disposing of the plea of *res adjudicata*—the reference we have made to the title of either parties having been for the *exclusive* purpose of determining whether the plaintiff has properly connected herself with the Juan de Leon grant.

Finding that she has connected herself therewith we are of opinion that she is entitled to urge the plea of *res adjudicata*, and that the judgment rendered in the suit of Hickman vs. Bailey operates as a complete bar against the defendant and warrantors in the instant suit, as to the title they urge as adverse to the de Leon grant.

That judgment and decree fulfil, in our opinion, all the requirements of the Code, which are as follows, to-wit:

“The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.” R. C. C. 2286.

In Heroman vs. Institute, 34 An. 805, we said:

“Matters once determined by a court of competent jurisdiction, if the judgment has become final, can never again be called in question by the parties or their privies.”

Again: “It matters not under what form the question be presented, whenever the same question recurs between the same parties the plea of *res adjudicata* estops.” Sewell vs. Scott, 35 An. 553.

These authorities are quoted with approval in Broussard vs. Broussard, 43 An. 921, and are followed in the Tutorship of the Scarborough Minors, 44 An. 288.

On other issues of the case we are of opinion that the judgment appealed from is correct.

Judgment affirmed.

Rehearing refused.

No. 11,475.

46 1099
118 178**MRS. K. B. WARNER ET AL. VS. CHARLES J. REDDY, EXECUTOR, ET AL.**

An act under private signature which recites that, for and in consideration of a person named, paying a certain mortgage note on one-half interest in the Moss Side plantation, the heirs of the deceased owner do transfer all of their rights, titles and privileges in said property belonging to their ancestor, renouncing all their interest in his favor, is a conveyance of the property evidencing a sale in the sense of the Code.

A PPEAL from the Fifteenth Judicial District Court, Parish of East Baton Rouge. *Buckner, J.*

Cross & Cross Attorneys for Plaintiffs and Appellants.

Kernan & Laycock and Read & Goodale Attorneys for Defendants and Appellees.

The opinion of the court was delivered by

WATKINS, J. This is a petitory action for the recovery from the executor of E. A. Yorke, deceased, of one-half interest in the Moss Side plantation, to which other collateral interests are joined.

Plaintiffs' claim is that on the 19th of August, 1869, H. P. Beckwith executed a deed of conveyance to E. A. Yorke and J. D. Hamilton, jointly, of one-half interest in said plantation; and on July 15, 1874, he executed a like conveyance to the same parties, jointly, of the remaining one-half interest in the property.

That on January 22, 1884, John D. Hamilton conveyed his half interest to Mrs. Elizabeth F. Yorke, wife of E. A. Yorke, mother of Mrs. Warner and grandmother of Miss Hamilton, the plaintiffs in this suit. That, consequently, upon the happening of Mrs. Yorke's death her estate was owner of one-half of the property in her own paraphernal right by conveyance from Hamilton, and one-half of the other one-half as her community interest by virtue of her husband's acquisition thereof during the marriage. That as she left three heirs at her demise the two plaintiffs inherited, and are the owners of two-thirds of three-fourths, equal to one-half interest in the plantation.

Defendants rely upon a subsequent transaction which occurred shortly after the death of Mrs. Yorke, between her three heirs and her surviving husband—insisting that the effect of same was to con-

Warner et al. vs. Reddy, Executor, et al.

vey a title to Edward A. Yorke, and that this conveyance defeat plaintiffs' title.

On the issue thus joined there was judgment rejecting the plaintiffs' demands and they have appealed.

Fully recognizing the transaction referred to as an impediment in their way, plaintiffs assumed the burden of removing it from consideration as a title, and in their petition took the initiative thus:

"That on the settlement of her affairs the said heirs made a family compact with the surviving spouse, E. A. Yorke, a copy of which is hereto annexed, *the true intent of which* was that the said Yorke was to pay the community debts and enjoy the usufruct of the whole property, both community and separate estate of the deceased, Mrs. Elizabeth Yorke, he agreeing to make a will leaving his whole estate to the heirs.

"That under this agreement the said Edward A. Yorke went into possession of said property, and at about that time executed hisolographic will annexed hereto, which was in compliance with said family compact.

"That said E. A. Yorke, using and abusing the confidence thus reposed in him by petitioners, who are non-residents, *adopted a scheme to use said instrument as an actual sale of said property*, and for this purpose appeared before a notary public in the city of New Orleans, with certain other persons to petitioners unknown, who personated petitioners, and signed an acknowledgment of said agreement hereto annexed, the tendency and effect of which were to recognize said agreement as a valid subsisting transfer of property, and thus deceive the public, petitioners never signing or knowing of said acknowledgment until after the death of said Yorke.

"*Now, they aver that said agreement does not in any manner purport to be a sale, nor is it in any legal sense an act of sale, there being no price and no definite description of the property sold.*" (Italics ours.)

In the foregoing elaborate statement we have a clear and definitive *exposé* of plaintiffs' case.

It is a noteworthy fact that plaintiffs do not deny or disavow this act, but distinctly affirm its genuineness. They aver that Edward A. Yorke went into possession under it; but charge him with adopting a scheme to use the same as an actual sale of said property by fraudulently procuring its acknowledgment, the tendency of which was

Baron et als. vs. Baum.

to recognize it as a valid subsisting transfer of property, whereas it does not, in any manner, purport to be a sale, nor in any legal sense is it an act of sale.

The following is the text of the instrument, viz.:

"We the undersigned children and lawful heirs of Mrs. E. F. Brandenburg, deceased wife of Edward A. Yorke, to-wit: Ella Brandenburg, authorized by her husband, John D. Hamilton, Kate B. Brandenburg, authorized by her husband, Jos. R. Warner, and Charles D. Brandenburg, for and in consideration of the said Edward A. Yorke paying in full with interest a certain mortgage note held by John D. Hamilton on Mrs. E. A. Yorke's half interest in Moss Side plantation, parish of East Baton Rouge, do hereby transfer all our rights, titles and privileges in said plantation belonging to our late deceased mother, wife of Edward A. Yorke, to said Edward A. Yorke, and by these presents put him in full possession of said property, renouncing all our interest in his favor, the said Edward A. Yorke guaranteeing to protect and assume all mortgages and debts against said plantation."

Conceding the full force and weight of plaintiffs' charges against the conduct and acts of E. A. Yorke, in our opinion they do not go to the extent or have the effect claimed for them. The authentication of the instrument, though fraudulently obtained, only enabled Yorke to procure its registry. It did not affect the title. On its face the instrument purports a conveyance and the judge *a quo* properly gave it effect.

Judgment affirmed.

Rehearing refused.

No. 11,476.

LOUIS BARON ET ALS. VS. JACOB BAUM.

In a succession where the judgment of the court recognizes a party as sole heir, and in pursuance of this judgment and under order of the court the administrator pays the balance of the succession after paying debts to said heir, heirs subsequently appearing can not compel him to account to them and answer personally for said sum in default of filing said account.

APPPEAL from the Fifteenth Judicial District Court, Parish of East Baton Rouge. *Buckner, J.*

Baron et als. vs. Baum.

Cross & Cross Attorneys for Plaintiffs and Appellants:

Cite 44 An. 295; 2 L. 299; 15 L. 527; 7 R. 188; 12 R. 258; 2 An. 389; 4 L. 571; 5 An. 113; 35 An. 355; 30 An. 861; 33 An. 605, 1321; 32 An. 1218; 35 An. 359, 419.

Kernan & Laycock Attorneys for Defendants and Appellees:

The appellant must bring up a complete transcript of the record and trial of the case below, otherwise his appeal will be dismissed. Records on the files of this court can not be used to supplement a defective transcript, unless they be records of different trials of the same suit, or at least of suits between the same parties. C. P. 896, 898; 5 L. 479; 7 An. 442; 8 An. 438; 9 An. 292; 13 An. 288; 82 An. 561.

A judgment establishing the personal status of an individual to be that of a legitimated natural child, pronounced by a court of competent jurisdiction, is *res judicata* against the world. Ennis vs. Smith, 14 Howard, 430; Caballero vs. Maduel, 26 An. 112; Maduel, Executor, vs. Tuyes *et al.*, 31 An. 484.

The judgment recognizing Mrs. Gillingham as heir of deceased, even if not *res judicata*, is at least *prima facie* evidence of her capacity as heir, and until set aside has sufficient force to protect the administrator or any other person dealing with her as such in good faith. 44 An. 295; 35 An. 420.

A judgment homologating an account, where the attorney for absent heirs voluntarily appeared and opposed the homologation, is a judgment rendered contradictorily with such absent heirs and constitutes *res judicata* against them.

A judgment homologating an administrator's account contradictorily with creditors, even if the heirs be not cited, will make *prima facie* proof of its correctness and protect the administrator in payments made in pursuance thereof. 12 An. 96; 25 An. 646; 2 R. 56; 24 An. 270.

A judgment can not be annulled for want of evidence, except by seasonable appeal.

The maxim "le mort saisit le vif," avails the legitimated child, because he is clothed with all the rights which he could have enjoyed, if born in lawful wedlock.

The opinion of the court was delivered by

MCENERY, J. This suit is the logical sequence of the case reported in 44 An. 295. The pleadings and the facts are stated therein. That suit was for the purpose of compelling a succession administrator who had been discharged to file an account to the plaintiffs claiming to be the legal heirs of the deceased. The administration of the succession had been closed and the account homologated. Under the order of the court the residuum of the succession had been delivered by the administrator to Mrs. Amelia Gillingham as the sole heir of the deceased.

The contest is between the brother and sisters of the deceased and Mrs. Gillingham, who claims to be his legitimated daughter.

Mrs. Gillingham was not made a party to the first suit. Therefore the decree was that "the judgment appealed from be amended so as to read as a mere judgment of dismissal, as in case of non-suit, reserving to plaintiffs the right to renew the action on proper averments, and against the proper parties.

In pursuance of this decree the present suit was instituted, making Mrs. Gillingham a party.

The prayer of the petition is that the judgment homologating the account be declared a nullity, and that the discharged administrator file an account to petitioners, and in default thereof they ask for judgment against him for five thousand four hundred and fifty-seven dollars—the amount of the property in the inventory which went with his bonds. Mrs. Gillingham is dead, and her representative was made a party defendant.

This controversy involves the issue of heirship. On this point the evidence in the record is meagre. It does not satisfy us that Mrs. Amelia Gillingham was an adulterous bastard, as urged by the plaintiffs.

She had applied for the administration of the succession, and this was opposed by Louis Baron, one of the plaintiffs, on the ground that she was not the legitimate daughter of the deceased, on account of her mother being unmarried at the time of her conception. Mrs. Gillingham was appointed administratrix, on the issues thus presented, but she failed to qualify. The defendant Baum was appointed administrator.

There is no note of evidence in the application of Mrs. Gillingham, and the plaintiffs claim that the decree appointing her adminis-

Block & Co. et als. vs. Jefferies et als.

tratrix is null for that reason. If an appeal had been taken from that judgment and lodged here on account of the absence of the note of evidence from the record, the decree would undoubtedly have been annulled and the case remanded. But there is no evidence that a note of evidence was not taken; the testimony of the clerk is that he could not find it among the *succession* papers.

He was not the clerk of court when the decree was rendered, and says he only looked for the note of evidence in one single bundle of papers, endorsed "Succession of Pierre Baron." We presume the decree was rendered in accordance with the allegations in Mrs. Gillingham's petition, supported by evidence. The decree closes as follows: "It is further ordered, adjudged and decreed that she be recognized as sole heir of deceased." It was under this decree that the administrator paid over to her the balance of the succession after paying debts. The absent heirs were represented by an attorney appointed for that purpose. The evidence does not show that there was any fraud or collusion between the administrator and Mrs. Gillingham. The decree had full force and effect until set aside. As long as it was in existence it was to be respected as a valid judgment, protecting the administrator in the final distribution of the funds of the succession.

Judgment affirmed.

Rehearing refused.

No. 11,468.

BISCOE BLOCK & CO. ET ALS. VS. W. T. JEFFERIES ET ALS.

INTERVENTIONS OF J. P. ROWAN AND SCHARFF, BERNHEIMER
GROCER CO. ET ALS.

46 1104
50 322

The respite is a judicial contract between the debtors and creditors and among the creditors. Therefore neither debtor nor creditor can take advantage of the other, and the creditors must remain on an equal and fair footing.

If the debtor does any fraudulent act to give an undue preference, *ipso facto* he becomes an insolvent, and the respite proceedings are converted into a cession. Privilege claims are not affected by the respite, and by consenting to the same privilege creditors do not waive their liens and privileges.

Creditors in a respite can not sue to have property returned to the debtor's estate for their individual benefit. Any action in other direction by an individual creditor will inure to the benefit of all the creditors.

If no opposition is made to a respite in ten days it can not be set aside. The alternative is to convert the proceedings into a cession of the debtor's property.

Block & Co. et als. vs. Jefferies et als.

When the respite debtor has absconded and abandoned the property on his schedule the courts have power to issue the requisite conservative writs to protect the property, and to appoint a syndic until a meeting of creditors can be convened.

A written notice to the creditor in respite proceedings is essential, but when the debtor informs the creditor of his intention to ask a respite, and the creditor answers that he does not wish to participate in the proceedings for fear of losing some advantage, but will not take steps against the debtor if the creditors agree to give time, the creditor can not after the respite is granted, because of want of notice, seize the property placed on the schedule. To all intents and purposes he consented to the respite.

A PPEAL from the Seventh Judicial District Court, Parish of Madison. *Montgomery, J.*

Wade R. Young Attorney for Plaintiffs and Intervenors, Appellants:

Articles 1986 and 1988 of the Civil Code are to be construed together, and do not apply in the case of an insolvent debtor who has obtained a respite, as the law does not contemplate that such debtor can pay his favored creditors in violation of the terms of the respite, or that the only consequence of such fraudulent payment shall be that the creditor so preferred shall be compelled to share the loss ratably with the complaining creditors.

"The law gives to every creditor, when there is no cession of goods, or other proceedings by which they are collectively represented, an action to annul any contract made in fraud of their rights." C. C. 1970.

"The judgment in this action, if maintained, shall be that the contract be avoided as to its effect on the complaining creditors, and that all the property or money taken from the original debtor's estate, by virtue thereof, or the value of such property to the amount of the debt, be applied to the payment of the plaintiff." C. C. 1977.

Such is the penalty which the law and the jurisprudence have always imposed in such cases.

And such is to-day the law and jurisprudence of France, of England and of the other States of this Union.

In cases of concealed fraud prescription begins to run from the date of discovery of the fraud.

Block & Co. et als. vs. Jefferies et als.

The case of *Byrne & Co. vs. Their Creditors* is directly in point, in which it was decided that the prescription of one year, relied on in this case, does not begin to run, in cases of concealed fraud, from the date of the contract, but from the time the contract was brought to the knowledge of the creditor; it is sustained by all the weight of reason and authority, and there is nothing in our reports in conflict with it. *Rosental vs. Walker*, 111 U. S. 185; *Bailey vs. Glenn*, 21 Wall. 342.

In *Brewer vs. Kelly*, 24 An. 246, it was decided that the action of creditors to annul a contract made in fraud of their rights commences to run from the date the contract is recorded, and not from the date the fraud was discovered, but the court was careful to say: "The creditor can not reasonably assert that the act has been concealed from him, or that his debtor has kept him in ignorance of it, when it has been placed upon the public records."

In *Reynolds vs. Batson*, 11 An. 730, the court said of the doctrine *contra non valentum agere non currit prescriptio*:

"It has been applied to prescriptions *liberandi causa* in three classes of cases. * * *

"The third class of cases is where the debtor himself has done some act to prevent the creditor from availing himself of his cause of action."

In *Hernandez vs. Montgomery*, 2 New Series, 433, the court said:

"Indeed, the idea of a man losing his right by not bringing an action, which it was impossible he could bring, involves such a contradiction in itself and leads to such monstrous injustice that nothing short of the most positive law could authorize any tribunal to sanction such a doctrine."

In *Martin vs. Jennings*, 10 An. 553, the court said:

"The objection that this rule is not to be found in the statute books does not impair its authority, for it is interwoven with our jurisprudence from the earliest times. It is impossible to compress every principle of law into a code. The Legislature has not intended to confine the mission of the jurisconsult to fields so limited."

"Any agreement of the debtor to buy the vote of the creditor, by giving security for the payment of the debt, must be considered a perversion of the course of justice, and a fraud upon

the court charged with the homologation of the deliberations of the creditors." *Slidell vs. Pritchard*, 5 Robinson, 104.

In the case of *Morgan vs. Nye*, 14 An. 80, cited by the court in the case of the Vicksburg Liquor and Tobacco Company, the court said of such a contract: "The vote, therefore, of a single creditor is not a mere offer to make a new contract between the debtor and creditor, but is a *quasi* judicial act by which the rights of other creditors are to be affected."

J. G. Hawkes and W. M. Murphy Attorneys for Defendants Utz & Boney, Appellees:

Where a party seeks to avoid a contract of sale, payment or preference, as made in fraud of creditors, he must allege and prove three essentials, viz.: fraud, knowledge of insolvency of the debtor, and injury to plaintiff. 44 An. 424; 38 An. 422; C. C. 1978; *Bouillon vs. Creditors*, 44 An. 19; 32 An. 433.

The judgment homologating a respite meeting is *res adjudicata* as to all matters occurring prior to its rendition. C. C. 3092; 11 An. 36; 3 La. 217; 43 An. 1139.

If the transaction complained of benefited plaintiffs instead of injuring them, they have no ground for complaint. C. C. 1978.

If acts can be revoked as in fraud of creditors, the parties must be placed in the same position they were before the contract was made. C. C. 1982, 1983.

The payment of a just debt in money can not be revoked under any circumstances, and there are no exceptions to this law. C. C. 1986; *Loewenstein vs. Fredikas*, 43 An. 893.

Actions to revoke fraudulent contracts, or those made to give preferences, are prescribed in one year from the date of the contract. C. C. 1987; 4 R. 439; *Bank vs. Girod*, 31 An. 592; *Bastian vs. Christensen*, 34 An. 883; *Morris vs. Cain*, 39 An. 720; 28 An. 652; 29 An. 285; 39 An. 610; *Babshaw vs. Douty*, 39 An. 720; *Mineral Water Co. vs. Deblieux et al.*, 40 An. 155.

A. L. Slack and H. P. Wells Attorneys for Chaffe & West, Liquidators and Appellees:

One of the essentials of a revocatory action is that it must be brought by a third person, no party to the contract sought to be revoked.

Block & Co. et als. vs. Jefferies et als.

Cross on Pleadings, Sec. 311. Here the plaintiffs are seeking to "undo" and "annihilate" proceedings they were the principal actors in.

Where a respite is granted the debtor is placed in the "friendly custody" of his property in order that the same—under the purview of the court—may be administered for the benefit of all his creditors. Such is the obligation he assumes, which creditors have the right to have secured them by a bond. R. C. C. 3093.

As Act 134 of 1888 authorizes a creditor to enforce his rights against his respited debtor by a rule to force him to insolvency, it results that the law considers the property still in its keeping, and that the respite is still a pending proceeding. If so, the only remedy the creditor has is under said act. This was what the court so strongly suggested in the *V. L. & T. Co. vs. J.*, 45 An. 621.

"Judicial proceedings, once regularly inaugurated, can not by any act of the parties * * * be annihilated." *State ex rel. Marx vs. Judge*, 45 An. 1350.

A revocatory action can not be brought to annul a cession any more than a succession. For the same reason it could not annul a respite. *Andrus vs. Creditors*, 45 An. 1067.

The plaintiffs can not "undo, and by undoing make to inure to their separate advantage, a judicial order." *V. L. & T. Co. vs. J.*, 45 An. 621.

A respite is not a device to "entrap the unwary," but a *quasi* judicial act (14 An. 30), by which the debtor places in the hands of the law his property, to so remain subject to the rights of his creditors to change into an insolvency. Act 134 of 1888.

When there is a cession of goods the revocatory action does not lie (R. C. C. 1970). A respite is a cession in abeyance—in embryo—and no portion of the creditors consenting to it have the right to forestall this cession, and absorb all the property of a surrender made for the joint benefit of all. Such a proceeding, judicially recognized, would put it in the power of a favored or unscrupulous few to defeat the rights of all, and thus not only "annihilate" and "undo" their own judicial act, but defeat the very letter and spirit of the law.

While there rests upon the respited debtor an obligation to the creditors, there is also as strong an obligation resting *inter sese* among the creditors (14 An. 80), which they can not violate.

If the respite can not be revoked, there is no right in the plaintiffs to attack a judgment of a co-creditor, which judgment is a mere incident to the main action; for the reason, had plaintiffs forced the common debtor into insolvency, the judgment could have been thereby "stayed" and its status determined in such form of proceeding, *in concursu* with all the creditors. A creditor who is not summoned by "letter," under Art. 3087, C. C., is not bound by the respite. *Mohr, Hanneman & Co. vs. Marks*, 39 An. 576; *Haydel vs. Girod*, 10 Peters, 284.

The *proces verbal* of the notary should affirmatively show that the creditors were notified; where it does not, and this want of notice is alleged, the notary can not testify that such was given. Judicial records should make proof of themselves, and their absence can not be supplied from the "uncertain memory" of even the officers. A bill retained to such testimony should be sustained.

The basis of a respite is the solvency of the debtor. (42 An. 851.) So, where a debtor has applied for a cession, he can not subsequently apply for a respite—using as the basis of it the insolvent schedule. The two proceedings are inconsistent and in violation of the express prohibition of C. C. 3097, and are null. C. C. 12.

Where a respite is obtained, a second application for same relief can not be heard, except by the unanimous consent of all creditors. C. C. 3095.

What is absolutely null has no effect, and can be questioned by any interested party at any time. *Willis vs. Ward*, 30 An. 1285; 33 An. 618; 34 An. 740.

One who discloses, when interrogated, every detail of a connection, charged as fraudulent, shows his innocence and good faith. Fraud is never presumed.

Privileged communications of a client to his attorney are sacred, and can not be communicated to other parties with opposing interest, and be used by them as the only basis of a suit brought in their name by such attorney against his former client. This protection lasts forever. *Greenleaf*, Secs. 237, 246.

Block & Co. et als. vs. Jefferies et als.

The opinion of the court was delivered by

MCENERY, J. This is a sequel of the suit of Liquor and Tobacco Company *et als.* vs. Jefferies *et als.*, 45 An. 621.

The plaintiffs, making all the creditors parties as plaintiffs or defendants, instituted the present action to annul the respite granted to the debtor, Jefferies. Some of the parties plaintiff were plaintiffs in suit of Tobacco Company vs. Jefferies, reported in 45 An. 621. As to these creditors who were plaintiffs in that suit, the matters disposed of in the same are *res judicata*.

As the same facts are alleged to avoid the payments made to the defendant creditor by Jefferies, the respite debtor, we need only refer to that suit to render herein the same decree as in that suit against the additional complaining creditors.

The amount of cotton shipped to Chaffe, Powell & West was in the ordinary course of business; the business which the creditors, parties to the respite, permitted the debtor to carry on and conduct in order, within the delays granted, to pay his indebtedness.

Utz & Boney, were privileged creditors, and by consenting to the respite did not waive their privileges or postpone the payment of the special privilege they had on the effects surrendered. R. C. C. 3095.

In Bennett vs. Creditors, 45 An. 1019, a similar question was presented. In that case, on rehearing, we said: "The proceeds of the sale of this cotton could not be ratably, as contended for by opponents, applied to the payment of all the debts. By granting the respite the creditors do not relinquish the privilege and pledge they may have on particular property of Mrs. Bennett at any time after the respite was granted; in fact she was bound under agreement to turn the cotton or its proceeds over to the furnisher of supplies. The furnisher of supplies had a right to the proceeds of the sale sufficient to pay his privileged debt. The surplus only could be ratably applied to the payment of the other creditors. Opponents were in no way injured by the disposition of the cotton."

In the instant case the respite debtor was a merchant. He had rented property from Utz & Boney, to carry on his business. The rent was payable by the month and the rent had been regularly paid. The lease had some time to run, and the rent was paid monthly as before the respite. When these privileged creditors unnecessarily consented to the respite there was no judicial contract

springing from the same that they should postpone the collection of rent yet to become due. The places leased were necessary for the debtor to carry on his mercantile pursuits, and by consenting to the respite, and to the carrying on of these pursuits the creditors necessarily consented to the continuance of the lease and the payment of its price.

This suit, in addition to the averments made in the tobacco company suit, asks that a certain judgment obtained by Chaffe, Powell & West against the respite debtor be annulled, and the property seized under it be applied to the payment of the debts due the complaining creditors, thus ignoring the claims of other creditors.

So far as the suit is instituted for the purpose of annulling the order granting the respite, the plaintiffs are estopped by Art. 3092 of the Civil Code, which says that the opposition to the homologation of the order must be made within ten days, in writing, dating from that on which the *proces verbal* of the deliberations of the creditors was returned to the clerk's office. After this delay has expired the creditors are forbidden to interfere with the order or to urge any fact which would have been effectual in setting aside the order if presented in time.

It has been frequently stated by this court that the respite is a judicial contract between the debtor and the creditors, and among the creditors. Therefore no creditor can make any agreement or contract with the debtor, by which he can secure an undue advantage over the others, and the debtor must so conduct his affairs as to preserve equality among the creditors. Any act of his in violation of the contract resulting from the respite is a fraud, and *ipso facto* turns the respite into insolvent proceedings, a cession of goods for the benefit of the creditors, as though it had been offered in the first instance. It is to be assimilated to a case in which the respite is refused by the creditors. C. C., Art. 3098.

The contract by this fraud is ended, and the respite stands as though it had been offered to the creditors and refused. That this course, in such a contingency, is the proper one to pursue is clearly outlined in the case of Tobacco Company vs. Jefferies, 45 An. 622.

It does not appear from the *proces verbal* that Chaffe, Powell & West were summoned to attend the meeting of creditors by letter, in accordance with law. They say under oath that they were never notified. But the record shows that they were aware of the con-

Block & Co. et als. vs. Jefferies et als.

templated proceedings for a respite, and in a letter to Jefferies, the debtor, declined to participate in the meeting for fear of losing certain privileges which they held on the property of the debtor's wife, in Mississippi. But they informed the debtor that, if the other creditors granted time to him, they would acquiesce and also delay the enforcement of their claims. The property in Mississippi paid some six thousand dollars on Chaffe, Powell & West's debt, and for the balance, say five thousand dollars, they sued their debtor, obtained judgment, without opposition on his part, and seized the property surrendered, which was enjoined by the creditors. The testimony in the record shows that this judgment was obtained through the connivance of Jefferies, with his consent, and evidently for the purpose of giving Chaffe, Powell & West an advantage over other creditors.

Under these circumstances, to all intents and purposes, Chaffe, Powell & West were parties to the respite.

It would be inequitable and unjust, and would in fact practically annul the benefit of a respite, to permit a creditor to arrange with his debtor for non-participation, and, possibly, through his efforts, to escape summons in the respite proceedings. and thus obtain a judgment by consent of the debtor and execute it against the property surrendered. The evidence justifies us in believing that such was the case here.

The complaining creditors pray that the proceeds of the sale of the property be applied to the payment of their several and individual debts. From what has been said above, it is evident that the prayer can not be granted. No creditor can seek an advantage not common to all. Through the efforts of individual creditors, whatever property of the insolvent debtor is recovered and restored to his estate must inure to the benefit of all the creditors. *Gumble vs. Andrus*, 45 An. 1081; *McGraw vs. Andrus*, 45 An. 1073; *Andrus vs. Creditors*, 45 An. 1067; *Anderson vs. Duson*, 35 La. An. 915; *Hayden vs. Yale & Bowling*, 45 An. 362.

The evidence shows that the debtor has violated the contract of respite, and *ipso facto* committed an act of insolvency, and as such insolvent, he no longer has the right to administer his property, and it must pass to his creditors. In addition, he has absconded and abandoned his property.

The plaintiffs contend, under these circumstances, they are unable

 Betz vs. Limingi.

to force the debtor into insolvency. The fraudulent acts themselves, *ipso facto*, forced him into insolvency, and it is only requisite for the court to appoint a syndic to administer the property. Revised Statutes, 1810. The court has power to issue all conservatory writs to protect the estate. 42 An. 71.

The amounts due for clerk hire are established, and they should be paid as general privilege debts.

Complaint is made by plaintiffs of costs paid by the sheriff, and the illegal disposition of a twelve months' bond by seizure and sale.

These matters can be adjusted in the settlement of the insolvent's estate. The facts before us are not sufficient to warrant a decree respecting them.

The injunction restraining the execution of the judgment of Chaffe, Powell & West against the property of Jefferies has served its purpose and there is no reason for a formal decree in reference thereto. The proceeds of the sale of the property not legally disposed of will be turned into the insolvent's estate.

We see no reason why we should disturb the judgment of Chaffe, Powell & West against Jefferies. We will only correct it so far as it affects the rights of the creditors of the insolvent in the seizure made of his property surrendered on his schedule.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and the seizure made under the judgment of Chaffe, Powell & West be set aside and the property restored to the estate of the insolvent debtor. It is further ordered that this case be remanded and proceedings therein continue as if the cession had been offered in the first instance by the defendant Jefferies. It is further ordered that payments be made and proceedings conducted as herein stated. The insolvent's estate to pay all costs.

Rehearing refused.

 No. 11,384.

PHILIP M. BETZ VS. FRANCOIS LIMINGI.

46	1113
124	779

Private actions do not lie for breach of public duty.

Section 26 of Act 20 of 1882, the charter of the city of New Orleans, requiring owner of lots to keep the banquettes in front of same in repair, and Act 114 of 1886, authorizing the City Council to establish a uniform grade of banquettes, and

Betz vs. Limingi.

requiring the owner of lots fronting on the banquettes to make the grade, imposes upon the lot owner a public duty, and a person injured by the neglect of the lot owner to repair the banquettes, or to make the uniform grade, can not bring a private action against the owner of the premises for the injury sustained for this breach of public duty.

There has been no grant of power to the city of New Orleans to change the general law and to transfer the responsibility for injuries resulting from defects in the public ways, from the public to an individual who is not directly responsible for their existence.

The duty of the property owner in repairing the banquettes and conforming to an established grade, is to the whole public of the city, all of its inhabitants who own in common the banquettes. The punishment for breach of this public duty must be in some form of public prosecution and not by a suit for damages by an individual.

There are certain burdens imposed upon individual members of a community for the benefit of individual and particular members of the same, which, for a violation of the duty imposed may give rise to an individual right of action as well as a public prosecution.

The distinctions between the duty imposed as due to the collective community, and that due to individuals is readily distinguished by the nature of the obligation.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

B. R. Forman Attorney for Plaintiff and Appellant:

Property owner bound to repair paved banquette. Sec. 36, Act 20 of 1882 (City Charter).

Responsibility for malfeasance. C. C. 2315.

Responsibility for non-feasance. C. C. 2316.

Louisiana sidewalk cases, damages allowed. *O'Neill vs. City*, 30 An. 220; *McCloughry vs. Finney*, 37 An. 27.

Obstructions in highways nuisances. *Wood on Nuisances*, Sec. 16; *Rose vs. Miles*, 4 M. and S. 101; *Barr vs. Stevens*, 1 Bibb (Ky.), 293; *Hughes vs. Heiser*, 1 Binn (Penn.), 463.

Private remedy exists where there is statutory obligation to repair. *Wood on Nuisances*, Secs. 315, 316.

Defective highway a nuisance. *Wood on Nuisances*, Sec. 307.

A highway, a way over which any person has a lawful right to pass. *Wood on Nuisances*, Sec. 233.

The strictest degree of liability to repair. *Wood on Nuisances*, Sec. 316.

Unsafe highway a nuisance. *Wood on Nuisances*, Sec. 317.

The traveler has a right to rely upon the streets as being safe. *Wood on Nuisances*, Sec. 331.

Betz vs. Limingl.

The obligation to repair is to keep the road in good repair. Ordinary care no defence. Good repair at all hazards. Wood on Nuisances, Sec. 320.

Horton vs Ipswich, 12 Cush. (Mass.) 488; City of Madison vs. Ross, 3 Ind. 236; Chicago vs. Major, 18 Ill. 349; Winship vs. Enfield, 42 N. H. 197; Erie City vs. Schwingle, 22 Penn. 384.

Sidewalks must be kept in repair throughout the whole width. Shearman and Redfield on Negligence, 3d Ed., Sec. 385, p. 467.

Chrétien & Suthon Attorneys for Defendant and Appellee:

No right of action exists against a front proprietor for personal injuries sustained by a pedestrian on the sidewalk. The fee being in the city, the action is against the municipal corporation. C. C., Arts. 454, 458; 14 An. 283.

Dillon on Municipal Corp., 3d Ed., p. 1028. This is the case, even where there is an ordinance imposing upon the abutting proprietor the duty of maintaining his sidewalk in safe condition.

Taylor vs. Lake Shore & Michigan R. R., 45 Mich. Rep., p. 74. 93 N. Y. 12; 48 Conn. 525. Sec. 36 of Act 20 of 1882 (Charter of New Orleans) is a matter of regulation between the city and its corporators, and does not impose a statutory liability upon the abutting proprietor.

It is within the power of the City Council to establish the grade of sidewalks. An ordinance fixing the grade, followed by notice, are necessary to impose a legal duty on the front proprietor. Acts of 1886, No. 114. No such ordinance is shown in this case.

Where there is no legal duty to raise the grade, there is no cause of action to recover in case of negligence. Elliott on Streets and Roads, p. 636.

The opinion of the court was delivered by

MCENERY, J. The plaintiff's wife was injured on the banquette in front of defendant's house, in the city of New Orleans, while passing in front of the same. It is alleged that the injury was in consequence of the defendant having neglected to repair the banquette. It is not alleged that the injury resulted from any obstacles placed on the banquette by defendant. There was judgment for defendant, rejecting plaintiff's demand. The plaintiff appealed.

HARVARD LAW LIBRARY

Betz vs. Limingl.

Section 36 of the charter of the city of New Orleans provides "that all paved banquettes in the city of New Orleans shall be kept in repair by the owners of the real property fronting thereon," and Sec. 8 of the same says the "City Council shall have power to compel the owners of property or tenants to keep their sidewalks in front of such property clean and in repair."

Act 114 of 1886 authorized the City Council to establish a uniform grade for the banquettes in the city. When the City Council in its discretion deems it necessary to alter the grade on any street it is made the duty of the City Surveyor "to give the grade and make it known," upon which the proper notices shall be issued by the Commissioner of Public Works to owners of property or their agents to conform to the newly established grade within ten days after the service of the notice. In default of the owner doing the required grading after the proper notice it is made the duty of the Comptroller of the City to have the work done at the request of the commissioner, at the expense of the owner. A certificate for the cost of the work is recorded, which becomes a lien on the property, with six per cent. interest per annum.

We are asked by plaintiff's counsel in default of judgment in his favor, to remand the case to correct certain alleged errors of the District Judge in his ruling in reference to the scope and meaning of Act 114 of 1886.

It will be unnecessary to remand the case, for the reason that conceding all that the plaintiff asks in reference to said rulings, we do not think he is entitled to a judgment. Conceding that the defendant had failed to make repairs to the banquette, and that the Council had ordered the banquette raised or lowered on the street on which defendant owned the property, and that he had been served with proper notice and had failed to comply with the same, still only a public duty would have been imposed upon him, the neglect to perform which could not render him liable to an individual who had been injured on the sidewalk or banquette in consequence of the failure to repair it, or to raise or lower it in conformity to the established grade. *Dillon on Municip. Corps.*, Sec. 1028.

In the case of *Taylor vs. Lake Shore & Michigan Southern Railway*, 45 Mich. 74, the Council of the city of Monroe had full and complete power over the streets, and the Legislature had granted to said city in its charter the power to compel owners and

occupants of property to repair the banquettes in front of same, and to keep them free from obstructions, and snow and ice.

The plaintiff in that case sued the defendant for an injury suffered by her in consequence of slipping and falling upon the ice which had formed on the sidewalk in front of premises occupied by defendant, who had failed to remove it in accordance with the city ordinance.

Judge Cooley, the organ of the court, held: "An ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice can not bring private action against the owner of the premises." The syllabus of the case is brief, and is as follows: "Private actions do not lie for breach of public duty."

In the case of *City of Hartford vs. Talcott*, 48 Conn. 525, the action was by the city against the defendant to recover the amount of a judgment against plaintiff for damages for an injury, caused by ice upon a sidewalk in front of his premises.

The city had been held liable because of the duty imposed upon it to keep the sidewalks in repair and free from obstructions. The City Council of Hartford had passed an ordinance requiring every owner or occupant of a building or lot bordering upon a street with paved or graded sidewalk, to remove from the walks all snow and ice within a certain time, and imposed a penalty for the non-performance of the public duty. The ordinance was passed in conformity to a general law of the State, which placed upon municipal corporations the burden of keeping the highways in their respective limits, in a reasonably safe condition.

The court held that there was no grant of power to the City Council to change the general law and transfer the responsibility for injuries resulting from defects in the way from the public to an individual who is not directly responsible for their existence.

And we can find no such power to transfer responsibility in the charter of the city of New Orleans or in Act 114 of 1886. The charter and Act 114, only authorized the enactment of an ordinance requiring each proprietor fronting on a street to assist the city in keeping the banquette in repair and to keep it to a certain grade.

And such seems to be the intent of the Legislature in relation to the city of New Orleans. No penalty is imposed by fine for the non-performance of the public duty imposed. The work is to be done at the expense of the owner, if he fails to do it, with an additional burden

 Homestead Co. vs. Linigan.

of six per cent. interest. By this legislation the city is not relieved from responsibility. It is still its duty to do the work, and as it has no authority to shift the responsibility for failure to do it, it remains answerable for injuries resulting from negligence of the owner, or its own omission to act.

It is claimed by plaintiff that under Sec. 36 of the city charter, quoted above, that the obligation to keep the banquettes in repair imposed a duty upon the owner of the lot in favor of all persons who use them, and that the neglect to keep them in repair, in consequence of which any one lawfully using the banquette is injured, renders the owner liable to him in damages. But the duty imposed was not for the benefit of individuals or a particular class of individuals. The duty was to the whole public of the city, to all its inhabitants, who own the banquettes and streets in common. The neglect to repair the banquettes was such a breach of public duty that its punishment must be in some form of public prosecution, and not by a suit for damages by an individual. 45 Mich. 74. There are certain burdens imposed upon the individual members of a community for the benefit of a particular individual or class of individuals which, for a violation of the duty imposed, may give rise to an individual right of action as well as a public prosecution. *Ib.* Such actions generally spring from franchises granted by the State or some subordinate political corporation, to be used for the benefit of the individual members of the community, or from the performance of a public duty by an official for the benefit of a particular individual.

The distinction between the duty imposed as due to the whole community collectively, and that due to individuals, is readily distinguished by the nature of the obligation.

Judgment affirmed.

Rehearing refused.

 No. 11,192.

AMERICAN HOMESTEAD COMPANY VS. MRS. MARY ELLEN LINIGAN.

In the absence of fraud or demonstrable error a party recognizing the existence of a corporation by subscribing for its stock can not defend an action on his subscription by impeaching the existence and capacity of the corporation.

The defendant having taken a loan as a stockholder, can not sustain the plea of the want of capacity of plaintiff to sue for the recovery of the amount loaned.

46 1118
47 1285
46 1118
49 484
46 1118
51 1886
46 1118
104 41
46 1118
107 302
46 1118
d111 887
46 1118
114 741

Homestead Co. vs. Linigan.

After issue joined, the filing of an exception of no cause of action will not be heard to defeat the admissions of the answer.

The exception must be decided with reference to the issues at the time it is filed. The answer and the testimony, that had been admitted without objection, at the time the exception was filed, showed an issue of indebtedness and precluded the possibility of returning to the allegations alone of the petition, to determine whether they were sufficient to maintain the suit.

ON THE MERITS.

The defendant has a right to the amount paid by her to the association, and to her annual dividends to the date of default, and they are credited on her indebtedness.

The attempt to forfeit these amounts fails.

The association provided that every member should pay weekly instalments on each of his shares; that, as often as the funds of the association should warrant it, the same should be put up to competition among the members, and the member offering the highest premium should be entitled to them, and should secure the payment by satisfactory security and pledge of shares, and should pay from the time of purchase interest at the rate of six (6) per cent. per annum in weekly instalments on the loan and premium capitalized, as a redemption fee; that whenever any stock which had been pledged should become equal in value to the indebtedness for which the same was pledged, the stock should cancel the indebtedness and it, the indebtedness, should be considered satisfied and be discharged.

The defendant purchased shares according to the articles of the association, received the amount of these shares, deducting the premium or discount, and gave security to secure both the loan and the discount.

Held: That the note and mortgage given as security are valid, and the sums secured are not usurious.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

E. D. Lebreton and Henry Chiappella Attorneys for Plaintiffs and Appellants cite:

East Pascagoula Company vs. West, 13 An. 545; *Liverpool and London Insurance vs. Hunt*, 11 An. 623; *Armorer vs. Case*, 9 An. 242; *Devall vs. Succession Watterston*, 18 An. 136; *Smith vs. Smith*, 3 Dessausure Sa. Car. 557; *Danforth's Digest (verbo Estoppel)*, p. 411; *Wallace vs. Loomis*, 97 U. S. 146; *Close vs. Glenwood Cemetery*, 107 U. S. 466; *Daniels vs. Tearney*, 102 U. S. 415; *Casey vs. Galli*, 94 U. S. 673; *Pochelu vs. Kemper*, 14 An. 307.

Williams vs. Lodge Masons of Monroe, 38 An. 620; *Polar Star Lodge vs. Polar Star Lodge*, 16 An. 53; *Curien vs. Santini*, 16 An. 27; *Atchafalaya Bank vs. Dawson*, 13 L. 506; *Riggin vs. Union Bank*, 18 An. 677; 2 Kent's Commentaries, p. 313.

HARVARD LAW LIBRARY

Homestead Co. vs. Linigan.

Act No. 151 of 1888, p. 212, defining and declaring homestead or building associations, societies and companies, corporations for the promotion of works of public utility and advantage; Smith's Commentaries on Statutory Construction, p. 293, Sec. 155; Smith's Commentaries on Statutory Construction, p. 695, Sec. 551; Cooley's Cons. Limitations, pp. 184 *et seq.*; Sedgwick on Statutory Law, pp. 37 and 252; Municipality No. 1 vs. Wheeler, 10 An. 745; 1 Marcadé, Sec. 62.

Act No. 115 of 1888, p. 177; Act of 1844, p. 15; Act of March 20, 1856 (relative to interest); Act of March 2, 1860 (relative to interest); R. C. C. 2924, 1939; Bryant vs. Louisiana State Bank, 8 M. 310; 39 An. 788; 29 An. 679; 6 R. 305; 18 An. 619.

Dinkelspiel & Hart Attorneys for Defendant and Appellee:

A body acting as a corporation but without authority of law can sue only in the individual names of the members. R. C. C. 446; 29 An. 369.

Usurious interest may be recovered by way of compensation, even after the lapse of twelve months. 2 La. 386; 13 An. 233; Thompson on Building Associations, p. 102; 39 Pa. St. 137, 154; 26 Pa. St. 269; 95 Penn. 122; 28 N. E. 801; 25 Ohio St. 208; 3 Ohio St. 517.

A pledgee as such, can not become the owner of the pledged property under any circumstances. R. C. C. 3165.

The opinion of the court was delivered by

BREAUX, J. In 1883, the "American Homestead Company" was organized.

The charter sets forth that the association shall have authority to loan money on security and to sue and be sued; that the shares shall be paid in weekly instalments.

It was agreed that each stockholder, not in arrears, should be entitled to receive a loan of two hundred dollars for each share of stock held by him (less premiums), when the funds in the treasury justified; the interest on the loans was fixed at the rate of six per cent. per annum, in weekly instalments; fines were provided for non-payment and forfeiture of stock.

Homestead Co. vs. Linigan.

The stock pledged, whenever it should become equal in value to the indebtedness for which pledged, should be canceled.

It was stipulated, under the terms of the charter, to divide annually the net earned profits, *pro rata* among the shares of stock not in default.

By act dated December 26, 1887, plaintiff made a loan to the defendant stockholder of five thousand and two hundred dollars, including therein the premium bid for the loan, for which she signed her note—authorized by her husband—to the order of plaintiff, on its face payable six years after date; subject to the terms and conditions of the association; bearing six per cent. per annum from date, and secured as to its payment by a special mortgage and vendor's lien.

This sale was preceded, about six months previous, by a sale from the defendant to the plaintiff for the sum of three thousand seven hundred and forty-four dollars.

The property being encumbered with mortgages accounts for the delay which elapsed between the two sales.

The object of these two sales was to secure a loan, and the difference in price between the sale by the defendant to the plaintiff and by the plaintiff of the same property to the defendant was the amount of the premium or bonus for the loan.

The conditions were, if the maker of the note, the defendant, paid the interest on the note weekly and the instalments on her stock punctually, the amount was to remain subject to a settlement and payment at the termination of the affairs of the association; but in case the purchaser failed to pay as agreed, the note became due. The plaintiff sues to recover the note and interest, also taxes, insurance premiums paid for her on the property mortgaged, attorney's fees and costs, and claims a mortgage and vendor's lien on the property conveyed by it to the defendant.

The defendant has not paid interest and other charges as alleged.

The defendant interposed an exception, and therein alleged that the plaintiff is not a legal corporation, and that it is absolutely without capacity to prosecute this suit in its corporate name.

The defendant also excepted on the ground "if the plaintiff can sue at all that the suit was not authorized by a resolution of the Board of Directors."

These exceptions were overruled.

Homestead Co. vs. Linigan.

In her answer the defendant denies plaintiff's allegations, says that plaintiff had no right to forfeit her stock, and that the value should be credited to the note upon which suit is brought; that she was charged interest on the amount of the note of five thousand two hundred dollars, when she should have been charged with interest only on the actual amount received by her, and that the interest actually charged should be credited to the amount actually due by her. She charges usury. She admits the payment of the taxes and insurance by the plaintiff as alleged, and her liability therefor.

She prays that plaintiff's demand be rejected, with costs, or if any judgment be rendered against her that it should be for the amount received by her on December 26, 1887, with six per cent. interest on that amount only, and that she should be credited with interest illegally paid, with the value of the stock pledged, and that the five per cent. attorney's fees be limited to the amount actually due.

After the answer had been filed and part of the evidence heard, the defendant interposed the exception of no cause of action.

The District Court pronounced judgment in favor of the plaintiff for the sum of three thousand seven hundred and forty-four dollars, with six per cent. interest from August 26, 1887, subject to a credit of one thousand five hundred and seventy-one dollars and ninety-six cents, the amount the court decided due to her by the plaintiff on twenty-six shares of her capital stock on March 29, 1892, and subject to a second credit of one hundred and forty-three dollars interest paid on the three thousand seven hundred and forty-four dollars, part of which the court held extinguished the interest due on the last mentioned amount on February 12, 1888, and the remainder was credited and applied as partial payments on the interest due on this date.

Interest and taxes paid were allowed, and five per cent. attorney's fees on the three thousand seven hundred and forty-four dollars, with conventional mortgage and lien on the property ordered to be sold.

From this judgment the plaintiff appeals.

ILLEGALITY OF THE CORPORATION AND THE WANT OF AUTHORITY TO
SUE IN THE NAME OF THE AMERICAN HOMESTEAD COMPANY.

This company was organized under Art. 683 of the Revised Statutes of 1870, in which there is no reference specially made to building

Homestead Co. vs. Linigan.

associations. The defendant alleges and argues that it was not the object in adopting the statute to authorize the forming of such companies.

Her counsel correctly concede that if she has been benefited she can not plead the want of capacity in plaintiff to make the loan and contract, as was entered into in this case.

They argue, however, that the act of incorporation being an absolute nullity, because unauthorized by law, the persons thus organized have the right to sue only in their individual names for whatever money be due and not as a corporate body.

We are referred to Art. 446 of the Revised Civil Code as the only article under which plaintiff can proceed. The defendant in her dealings with plaintiff does not charge fraud or error. She treated with it in all respects as being a legal corporation. She became one of its stockholders and sought thereby the benefits it offered to incorporators.

Her taxes were paid by it, premiums of insurance and an amount borrowed, and she fully recognized the legal existence of the corporation. She participated in the annual dividends. She can not be heard to impeach the existence and capacity of the corporation of which she was a member.

The illegalities on which the appellee relies might, perhaps, have been sufficient cause for defence on the part of third persons injuriously affected by such transactions, but she is estopped from denying the existence of a corporation from which she as a stockholder and on account of her shares has received benefits.

The subscriber is under obligation to perform the promise distinctly made and pay all that is legally exigible. Having voluntarily acted as a corporator and exercised privileges which belong to that capacity, there is reason estopping her from denying the validity of the charter.

The question was decided in *Casey vs. Galli*, 94 U. S. 680.

The court said: "Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they as-

HARVARD LAW LIBRARY

Homestead Co. vs. Linigan.

sume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent in its effect and consequence should be as if it were real, and the law properly so regards it."

In *Eaton et al. vs. Aspinwall*, 19 N. Y. Court of Appeals, p. 119: "A defect in the proceedings to organize a corporation is no defence to a stockholder sued to enforce his personal liability, who has participated in its acts of user as a corporation *de facto*, and appeared as a shareholder upon its books when the debts for which he is sued was contracted." See also *Rice on Ev.* 891, 1st Ed.

In *Liverpool and London Fire and Life Insurance Company vs. E. C. Hunt*, 11 An. 623, a similar principle was laid down, and the court sustained a suit for the restitution of money paid to the defendant, who denied the existence of the company.

In *East Pascagoula Hotel Company vs. James West*, 13 An. 545, the stockholder was not permitted to set up, by way of defence, any illegality in the charter, or any informality in the organization.

It is true that the case of *Workingmen's Accommodation Bank vs. Converse*, 29 An. 370, is not absolutely in line with these and other State and United States decisions upon the subject. Article 446 of the Civil Code is given in this case the effect of a prohibitory law. The authority to stand in judgment is one of the rights to which the defendant consented in becoming a stockholder. She is as much precluded from denying these rights as she is from denying the validity of the charter. The clause of the act of incorporation granting the authority is not in contravention of laws made for the preservation of public order or good morals.

It is not of such a prohibitory character as that it may not be waived and bind the party waiving.

The principle that "corporations, unauthorized by law, or by an act of the Legislature, enjoy no public character and can not appear in a court of justice" is binding and must be given full effect as against third persons, as expressed in the *Converse* decisions (29 An. 370), but this requirement ceases when parties choose to so contract as to absolutely bind themselves and receive actual benefits from which they can not be released without its being contrary "to the plainest principles of reason and good faith."

Homestead Co. vs. Linigan.

In the cited case a secretary and the sureties on his bond were sued.

The relations of a stockholder are nearer to the company in so far as relates to the responsibility for the charter and other acts of organization. In this may be found sufficient difference in the two cases to maintain the former in its entirety.

Be this as it may, the difference of our views from those expressed in the Converse case is not in any event great. In so far as relates to stockholders, however, the authority of that decision must yield to the number of decisions of the State and the United States Supreme Courts.

AUTHORITY OF THE BOARD OF DIRECTORS TO SUE.

The defendant further excepts on the ground that, if the plaintiff can sue, the institution of this suit was not authorized by a resolution of the board of directors.

The resolution adopted is plain and directs the company to foreclose the mortgage against the defendant.

NO CAUSE OF ACTION.

The amount is alleged as being due by the wife. The note and mortgage were signed by her as maker and mortgager.

They are due by her.

The petition substantially sets forth the claim.

The defendant admitted, in effect, that whatever amount might be due was due by her.

The exception filed after the answer had been filed could not destroy the effect of the joinder of issue and of the admission of the answer.

THE POINTS CONTROVERTED ON THE MERITS.

The first question for our consideration relates to the forfeiture *vel non* of defendant's stock.

In reaching a conclusion we have written a brief statement of the plan and motive of building associations as we understand the scheme.

They are founded on the theory that it is possible for a given number of persons to pool their savings each month, until the total amounts to a sum sufficient to make it an object, to divide it among the contributors.

HARVARD LAW LIBRARY

Homestead Co. vs. Linlgan.

That if each monthly collection be invested the revenue *pro tanto* will be increased and the time within which to accumulate the amount of savings contemplated shortened.

The idea being to enable persons to own their homes, the money is invested primarily among those members who choose to take loans for that purpose.

The borrower in paying interest on this loan pays a part to himself; he increases the savings that are partly his.

He thereby anticipates payments and at once gets a house to be paid for in a number of years.

For the reason that there are a number of applicants for these loans they are offered to the highest bidder.

The bid is the discount, the premium—that is, the difference between the par value of the shares and the sum loaned to the borrower.

In forming these organizations there is generally an agreement that, if a member borrows he will be entitled to receive by way of loan or advancement, an amount equal to the par value of the shares he holds less the premium; also one regarding the forfeiture of stock and the privilege of withdrawing from the association without being subject to a forfeiture of the money paid.

This last privilege manifestly is most valuable and one that the defendant has.

Regarding the forfeiture of the sums paid by the defendant the counsel for plaintiff in the last brief direct attention to the fact that plaintiff bases no demand in the prayer of the petition for the stock itself, and that it is not seeking to obtain a decree recognizing the validity of a forfeiture, and that the question of forfeiture is not before the court.

The answer specially controverts plaintiff's right to forfeit her stock upon different well stated grounds. Plaintiff's allegation that the stock had been forfeited provoked the issue, although not followed by prayer for a recognition of the validity of the forfeiture.

The question of forfeiture is now inseparable from the issues as presented for solution.

Counsel for the plaintiff in their brief state that should the question of forfeiture be considered, as in this case, they have no hesitancy in declaring most positively that in this particular instance, in view of the facts which were only developed during the trial of the case, they disclaim any intention of obtaining the enforcement of

Homestead Co. vs. Linigan.

the forfeiture, and aver that defendant "should receive full credit for the sum of one thousand five hundred and seventy-one dollars and ninety-six cents, which is the aggregate of all paid instalments and declared dividends."

Questions of plaintiff's waiver of the forfeiture after attempt had been made to forfeit the stock; of the impossibility of forfeiting stock as attempted, it being stock deposited in pledge with the plaintiff; of deficiency of rules in matter of the enforcement of forfeiture, are disposed of by the admission of plaintiff as made through counsel as above stated, and the consent to give credit for instalments and dividends declared is binding upon it.

THE USURY ALLEGED.

The fact that a member of a building association in taking a loan for the amount of his stock agrees to pay a premium does not render the contract usurious.

The transaction is a loan not entirely free from a partnership venture.

The papers on their face show a loan of a specific amount.

The fact remains that the premium included in the note is not exclusively for the loan of money, for it is charged to the borrower for the privilege of anticipating and at once realizing on his stock. The par value was advanced to the stockholder, less the premium.

There is, however, an appearance of partnership in the transaction, in that the funds are invested in a joint enterprise of members, who will, after deducting all expenses, share the net earnings of the society.

We have Endlich, p. 335, as authority for the statement that in England the later cases admit no question as to the nature of the transaction, but take it for granted that it is a partnership transaction, and proceed upon this as a legal postulate, that in a *bona fide* partnership it is not usurious; that it is a dealing with the partnership funds in which a member has an interest in common with his fellow members; that the defendant was interested in the funds when the money was advanced to her and when it was repaid.

The decisions of the courts of this country are not uniform upon the subject. In Massachusetts and New Hampshire the partnership theory obtains. The transaction is not a mere loan. The monthly payments, it was held in the former State, are for the privilege of

HARVARD LAW LIBRARY

Homestead Co. vs. Linigan.

becoming an owner of a certain number of shares, and of eventually taking the dividends to which, by the articles of agreement, he would, upon the winding up of the affairs, be entitled. All the associates had the same right. Each one would determine for himself what was the value of the prospective benefit to be enjoyed, and would make his offer for the money to be loaned according to his estimate of the worth of the shares which he was allowed to take.

Since the borrower is to have his full proportion of the benefit of all the gain he can not assert that the lender has reserved to himself a usurious rate of interest. *Merrill et al. vs. McIntire*, 13 Gray, 157.

The transaction can not be held usurious, because it is a dealing between them as partners in relation to partnership funds in which they had a common interest. *Delano vs. Wild et al.*, 6 Allen, 1.

This case is cited with approval in the case of *Clarkville Building and Loan Association vs. Stephens*, 11 C. E. Gr. 351, 26 N. J. Eq. 351.

By the court in that case "the association in this case (*Delano vs. Wild*) was unincorporated, but the principle declared, if sound, must govern the rights of the members of an incorporated association." See also *Hoboken Building Association vs. Martin*, 2 Beas, 428, 13 N. J. Eq. 428, *Franklin Building Association vs. Marsh*, 5 Dutch., 29 N. J. Law 225.

In New Hampshire, in another case of an unincorporated company, the court followed the Massachusetts decisions. *Trustees Manchester Loan and Fund Association vs. Dunn*, 43 N. H. 194.

In Georgia, in *Patterson vs. The Albany Building and Loan Association*, 63 Georgia, 373, the doctrine of the court is closely akin to those cases before cited by us.

In Indiana the premium was said not to be interest on money, but a contract price for the privilege of borrowing. *McLaughlin et al. vs. The Citizens' Building, Loan and Savings Association*, 62 Ind. 264; 64 Ind. 600.

In *Reeves vs. Ladies' Building Association* (56 Ark. 335) the syllabus reads:

"In a loan made by a building association to a shareholder in the usual form there can be no usury, because the rate of interest payable by him is contingent upon the length of time required to pay out his share."

In Connecticut, Iowa, Ohio and in Pennsylvania the courts entertain a contrary view and hold that the conditions of such loans can be enforced only when authorized by statutes.

Homestead Co. vs. Linigan.

The society in this case having been organized prior to the adoption of the statute authorizing such association, viz.: prior to the adoption of Act 115 of 1888, it remains for us to consider the statute of an unincorporated association.

They are said to be partnerships only, and that their acts are to be judged by the law applying to persons.

"In applying this law the courts will allow themselves to be guided by the rules which were adopted by the members in forming the association, whose binding efficacy, they in joining it, have either formally recognized and subscribed to, or precluded themselves from denying, by their participation in the society's business and profits under these rules. These are analogous to articles of co-partnership entered into between the different members, and the reciprocal rights and duties arising under them, so far as they are contemplated by law, are protected and enforced by the courts, as in the case of voluntary benefit associations, to which they bear a close resemblance." Endlich, Building Ass., Sec. 517.

If the conclusion be reached that the contract was not so essentially that of partnership, as to relieve it from the taint of usury, the rules, principles and policy of the law must be applied in determining the legality of any article and not special statutes, for there were none at the time regulating building associations. The provisions of the law relative to notes being: the owner of any promissory note shall have the right to collect the whole amount, notwithstanding it may include a greater rate of interest than eight per cent. per annum, its principles are not only not violated, but complied with, in capitalizing the premium with the amount of the loan.

In recognizing the effect of the article upon the contract there is nothing of harshness, for the demand of the premium is not extravagant, in view especially of the delays that have elapsed.

There was no oppression, or advantage taken of necessities.

When the suit was instituted more than four years had elapsed from the date of the loan.

There was from the first an element of uncertainty in the contract, excluding questions of an exclusive loan and usury.

"When the promise to pay a sum of money above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious." Spain vs. Hamilton, Admr., 1 Wall. 604; Tyler on Usury, p. 98; Lloyd vs. Scott, 4 Pet. 205.

HARVARD LAW LIBRARY

Fernandez vs. City et al.

In the case of the succession of Latchford, 42 An. 537, we maintained the validity of the premium. As in the case at bar there was consideration, other than the mere loan of money.

Entertaining these views it follows that interest is due on the note declared upon from its date.

The prohibition of the statute of 1860 relates only to interest after maturity.

Interest is due at the rate of eight (8) per cent. on the amounts of premiums of insurance and taxes paid. This rate of interest is especially provided for in the by-laws of the plaintiff association.

It is therefore ordered and decreed that the judgment appealed from be amended and increased, and that plaintiff have judgment against defendant for the sum of five thousand and two hundred dollars, with six per cent. interest thereon from the 26th day of August, 1887, until paid, subject to a credit of one thousand five hundred and seventy-one and 96-100 dollars (\$1571.96), from March 29, 1892, and subject to a further credit of one hundred and forty-four dollars; that the interest on the amount of taxes and insurance of defendant paid by plaintiff shall be eight per cent per annum from the date of the respective payments, and the fee of attorney is five per cent. upon the principal of the note due by defendant.

As thus amended the judgment is affirmed at appellee's costs.

Rehearing refused.

No. 11,393.

L. F. FERNANDEZ VS. CITY OF NEW ORLEANS ET AL.

Plaintiff, holder of evidences of indebtedness sues for judgment against the defendant.

There are no funds in the treasury for the years the debts are due.

The ordinance under which the defendant became indebted provides, that the claims shall be warrantable and payable whenever there shall be money in the treasury to the credit of the appropriate funds.

It is the law of the contract binding the original claimants and their transferee. The creditor has a right to a warrant on the treasurer, payable out of the appropriate fund.

Prescription. That plea does not attach to a right for which judgment can not be obtained.

There is a suspension of prescription on those rights for which plaintiff has no cause of action.

The principle *contra non valentem* applies.

A PPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

46 1130
48 596
49 848
46 1130
51 1151

Fernandez vs. City et al.

Charles Louque Attorney for Plaintiff and Appellant.

E. A. O'Sullivan, City Attorney, for Appellee.

The opinion of the court was delivered by

BREAUX, J. Plaintiff sued to recover six thousand four hundred and twenty and 14-100 dollars from the defendant, with legal interest from judicial demand.

The court *a qua* entered a decree recognizing the plaintiff as the owner of the claims held by him.

The defendant does not ask for a reversal of the judgment, but prays that it be affirmed.

There is therefore no issue before us in so far as relates to the recognition of the plaintiff, as owner, by transfer from the original claimants of claims, against the city of New Orleans for the years 1881, 1882, 1884 and 1886.

In all other respects plaintiff's demand was dismissed as in case of non-suit, without prejudice to the city's rights to plead prescription against the claims or to urge any other defence hereafter, except that of want of ownership or title to the claims sued on.

The record discloses that there are no funds in the treasury for the years before stated, upon which warrants can be drawn in satisfaction of plaintiff's claim.

The ordinances under which these claims became an indebtedness of the defendant contains the condition that they shall be warrantable and payable whenever there should be any money in the city treasury to the credit of the appropriate fund.

It is the law of the contract binding the original claimants and their transferee.

The equities between the debtor and the present holder are not closed for the reason that the claims are not negotiable and the transferee has only such rights as the original claimants had.

In *Neugass vs. City of New Orleans*, 42 An. 169, this court held: "all that the creditor could claim would be a warrant on the treasurer, to be paid out of the appropriated fund in the city coffers, in the order stated in the ordinance."

An absolute judgment against the city for the amounts was never contemplated.

HARVARD LAW LIBRARY

Calvert, Tutrix, vs. Boullemet.

The relief sought can not be granted. The law in the cited case applies to the case at bar.

With reference to interest, it has been repeatedly decided that claims against the city of New Orleans do not bear interest until there is money in the treasury and the city refuses to pay.

Fernandez vs. City of New Orleans, 42 An. 1, with reference to the prescription pleaded:

These claims are not subject to prescription that the judgment applied for can interrupt.

The payment being suspended and made conditional to there being funds in the treasury, the plea is ineffective until a right of action arises.

The questions decided in this case were considered at some length in the case of Johnson vs. City, decided this day. 46 An. 714.

The case at bar being similar the same judgment must be pronounced. See also Wadsworth vs. City, 46 An. 545.

In so far as relates to prescription the judgment appealed from is amended.

It is ordered, adjudged and decreed that the judgment appealed from be amended by rejecting the plea of prescription, and in all other respects it is affirmed at appellee's costs.

Rehearing refused.

No. 11,359.

MARY H. CALVERT, TUTRIX, vs. NETTIE B. BOULLEMET.

The legacies to minors, to be held and administered for their benefit by the executrix of the deceased, and not paid to them until their majority or emancipation, is valid. Succession of Macias, 31 An. 127; Strauss Succession, 38 An. 59. Such a disposition imposes the trust on the executrix to hold and administer the legacies as directed by the will, and that trust continues, notwithstanding the discharge of the executor granted on her petition. This trust continuing, there is no basis for this court to direct the payment of the legacies to the dative tutrix of the minors.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

A. G. Brice and Frank E. Rainold Attorneys for Plaintiff and Appellee:

46 1132
48 165
48 180
49 1181

Calvert, Tutrix, vs. Boullemet.

An executrix who is directed to retain in her hands and administer a legacy left to a minor is a "*quasi tutrix*." 45 An. 962, Succession of Stephens.

If such an executrix has herself discharged from her office and takes possession of the entire estate of the decedent as universal legatee, the dative tutrix can claim the amount of the legacy from her.

When a person appointed tutor by last will and testament refuses to accept the office, the property and rights of the minor are entrusted to a dative tutor. *Quoad* the minor's legacy, the executrix was a tutrix by will to the minor. Having ceased to be an officer of the court, she can no longer retain in her hands the estate of the minor.

Whether the codicil of the decedent made the minor the absolute owner of the sum bequeathed to her, or merely the usufructuary thereof, her tutrix can recover the amount of the legacy from the universal legatee. 34 An. 709.

J. Zach. Spearing Attorney for Defendant and Appellant:

In construing a testament, the intention of the testator must be sought; a disposition must be understood in a sense in which it can have a reasonable effect, rather than in that in which it can have no effect, or an unreasonable one; recourse must be had to all the circumstances which may aid in the discovery of the true intention. R. C. C. 1712, 1713, 1715.

The language of the testator and the circumstances of this case, show that the testator intended the legacies under consideration to be retained by his widow, who was also his universal legatee and executrix, until the legatee, become of age or were emancipated.

A legacy to minors on condition that it shall not be due or payable until the legatees become of age or are emancipated is legal, and the condition will be enforced by the courts of this State. Succession Macias, 31 An. 127, 128; Succession Turnell, 32 An. 1220; Succession Strauss, 38 An. 57, 58; Pinkston vs. Morse & Zunts, 28 An. 890.

The opinion of the court was delivered by

MILLER, J. The plaintiff, the tutrix of the minor Annie Gertrude Calvert, seeks to recover from defendant, the universal legatee of Sumter C. Boullemet, the amount of the special legacy to the minor

HARVARD LAW LIBRARY

Calvert, Tutrix, vs. Boullemet.

contained in the will of the deceased. The will originally gave to the minor, without condition or qualification, the amount of the legacy, and on the same terms contained legacies to two minors, the nephews of the deceased. By a codicil the testator directed that these legacies to the minors should not be paid till their majority or emancipation, and in the event of the death, before or after that of the testator, of one or two of the legatees, the legacies to them should accrue to the survivor. The codicil further directed the legacies were to be administered by the executrix for the benefit of the minors, until their majority or emancipation. The executrix was the wife as well as the universal legatee of the deceased. She qualified as executrix, caused an inventory to be taken, filed an account exhibiting disbursements, embracing payments of all legacies except those to the minors; these last the account stating not being payable till the majority or emancipation of the minors.

The account was homologated, the universal legatee put in possession and discharged as testamentary executrix. Thereafter, this suit was brought by the tutrix of the minor, Annie Gertrude Calvert, for the payment of the legacy to the minor. The plaintiff substantially contends that by the discharge of the executrix, procured by her, she ceased to be an officer of the court, or, if deemed a *quasi* tutrix, she vacated her office, and can not retain the legacy which the will directs she shall hold and administer as executrix.

Dispositions similar to that contained in this will with reference to the retention and administration, during minority, of legacies to minors have been upheld by this court. 31 An. 131, the Macias case; the Strauss case, 38 An. 59. We do not understand that these decisions are called in question. It is the discharge of the executrix which is conceived by plaintiff to afford the basis for her demand. Viewed as a valid disposition, the part of this will under consideration imposed a trust or duty upon the executrix, to be performed for the benefit of these minors. Qualifying under the will was acceptance of that trust, and bound the executrix to its performance. Civil Code, Art. 1658. Under the change in our law by statute, executors, it is enacted, shall continue in office until the succession is finally wound up. Civil Code, Art. 1673, adopting the statute; Revised Statutes, Sec. 8. See also 5 An. 645.

In our opinion the executrix was not relieved, by her discharge, from the trust of holding and administering this legacy for the benefit of the minor, as directed by the will. Nor is it appreciated that

Calvert, Tutrix, vs. Boullemet.

the executrix had any purpose to escape from her duty, in this respect, in applying for her discharge as executrix. We hold that *quoad* these minors and the legacies in their favor, the trust and duty imposed on the executrix was unaffected by the discharge granted on her application. In this view, the executrix being still subject to this trust and bound to execute it, there is no basis for plaintiff's demand, which rests on the theory that her discharge, as executrix, rendered her incompetent to hold and administer the legacy as directed by the will. The decisions in the Macias and Strauss cases give recognition to *quasi* tutorships for the execution of dispositions like that under consideration in favor of minors. In this case we think the executorship of defendant continues in respect to the legacies to the minors.

The court reaches its conclusion the more readily, in view of the great solicitude exhibited by the testator on this point, *i. e.*, that no payment of these legacies should be made until the majority or emancipation of the minors, and until then should be held and administered by his executrix. This non-payment until majority or emancipation, and this control and administration by his executrix, who was also his wife and universal legatee, was the dominant idea in the testator's mind. To effect that purpose the testator added the codicil. In the codicil, in the most explicit terms, he declares and repeats that no payment of the legacies is to be made until the majority or emancipation of the minors. He makes it more emphatic in changed language, "it being my wish and intention that no portion of these legacies shall be due and payable to the legatees" until they are of age or duly emancipated. His closing expression is that his executrix, previously directed to hold the legacies, shall administer the legacies for the benefit of the minors until their majority or emancipation. The cardinal rule in giving effect to last wills, is to adhere to the intention of the testator. The substantial execution of that intention we think secured by this decision. To order the payment of these legacies to the dative tutrix, an official not within the contemplation of the testator, and that too when the legatees are still minors not emancipated, would, in our opinion, be to defeat and not execute the intention of the testator.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that the plaintiff's petition be dismissed at her costs.

Rehearing refused.

HARVARD LAW LIBRARY
UNIVERSITY OF CHICAGO

No. 11,480.

S. W. RAWLINS VS. D. M. GIDDENS ET AL.

Where, under the advice of a family meeting, duly held and homologated, certain immovable property of the minor, alleged to belong to him by the tutor, is exchanged for other property of the same kind, the judgment of the court authorizing and approving the exchange is conclusive between the tutor and the minor. The property exchanged for the minor's property becomes their property irrevocably as against the tutor and those claiming through or by him, and including creditors whose claims originated after the judgment.

In a settlement with the minor, personal property which has become old and worn out, and with the proceeds of the sale of the property it is replaced by other property, the latter belongs to the minor.

When the tutor inflates his credits and pays no money to the minor, and on the settlement turns over property only which belongs to the minor, the creditor of the tutor, for the debt due by the tutor to the minor, has no right to subject the minor's property thus turned over to the satisfaction of his debt. The creditor, therefore, has no interest in insisting upon an exact statement of the tutor's accounts in such a case.

When the tutor has had the use of the minor's plantation for a long period of years, and pays no rent, but charges himself with it, the property, upon which the minor has a lessor's privilege, will be subjected to the payment of said rent.

ON APPLICATION FOR REHEARING.

1. The separate creditor of either spouse has the right, after the dissolution of the community, to have the community liquidated, and to subject according to law to the satisfaction of his claim the interest of his debtor thus ascertained.
2. The separate creditor of the husband can not, after the community has terminated by the death of the wife and the rights of the parties have become fixed by that fact, deal with an undivided interest in any specific piece of property, if it belonged to the community, as if the husband had the absolute ownership of one undivided half thereof. He has not the right to seize directly an undivided interest in a specific piece of property, sell it, and apply the proceeds of the sale to the payment of his debt.

A PPEAL from the Ninth Judicial District Court, Parish of Red River. *Hall, J.*

J. F. Pierson Attorney for Defendants and Appellants:

The creditor can not be injured by a transfer or sale from one of his debtors *in solido* to another debtor *in solido*, for the same debt; and in no case can the creditor maintain the revocatory action to annul a sale, unless he be actually injured thereby. *Seixas vs. Citizens Bank*, 38 An. 429.

Where plaintiff in the revocatory action sues to set aside an account and settlement by a tutor with his wards at the termination of the tutorship, as a sale transfer and giving in payment by

46 1136
46 1406
46 1196
46 1136
47 538
46 1136
48 337
46 1136
50 219

the tutor to his wards, and the wards in answer to such suit disclaim the account and settlement with them, as any title to them to the property mentioned, and disclaim any intention to acquire or hold the property under such alleged sale transfer, or giving in payment, but in reconvention set up their title by inheritance from an entirely different source, and upon which the case goes to trial, such an issue presents no feature of the revocatory action or action of simulation, and becomes an action petitory in its nature and character, involving only the ownership of such property under such adverse title so set up by the wards. 39 An. 635.

In such case the burden is upon the ward to establish ownership under such adverse title, and his disclaimer under the act sought to be revoked or annulled debars him from any claim to the property, as against the suing creditor, under the act assailed; hence, no grounds remain in the case for the revocatory action or action of simulation.

The creditor has the legal right and capacity to stand in judgment as against third persons for property claimed by him to belong to his debtor. *Spencer vs. Goodman*, 38 An. 898.

In a suit to make out title to his debtor, the rights and privileges of the creditor are precisely those of the debtor himself. *Nouvet vs. Vitry*, 15 An. 653.

In cases tried by a jury the court must render judgment pursuant to the verdict of the jury. C. P. 541; 4 An. 6; 6 An. 727; 17 An. 167; 33 An. 583.

The court can grant no relief, nor can it insert in the judgment any clause not authorized by the verdict, nor can the court condemn the defendant in the revocatory action when the verdict does not authorize such judgment, and when the case was not tried upon such issue. C. C. 1977; 33 An. 1086; 34 An. 1214.

A final judgment of the probate court, decreeing the property in the hands of the tutor to belong to the minors in his charge, is a judgment settling the status of such property in his hands, and as such is conclusive against the tutor, and all others subsequently claiming under or through the tutor. 28 An. 112.

Such judgment is the highest evidence of the fact that the property belongs to such minors, and can not be impeached. *Grevanburg vs. Bradford*, 44 An. 422.

Rawlins vs. Giddens et al.

No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy. Campbell, J., Jester vs. Hewitt, 22 How. 864-876.

A member of a family, and all claiming under him, are estopped from claiming land recognized in the proceedings as belonging to the minor. 11 An. 502; 6 An. 722; 40 An. 189.

Successors, or *ayant cause* of parties to the original suit, are considered as parties themselves when their titles have been acquired since—*aliter*, if before. 3 An. 320; 12 An. 873; 4 Rob. 23; 7 An. 445; 9 An. 150.

A father can make a purchase in his minor child's name, but not to the detriment of existing creditors. Subsequent creditors can not contest the purchase. Hopkins vs. Buck, 5 An. 487; 5 N. S. 634; 5 L. 126; 2 An. 959.

Where a party has recognized the title of another to property and has thus estopped himself from questioning the validity of such title, a party holding under him the same property, as vendee, must be held to a recognition of that title and must show that he has acquired the same or fail in maintaining his right to it. Girault vs. Zunts, 15 An. 685; 34 An. 634.

J. C. Egan Attorney for Plaintiff and Appellee.

Same Counsel and J. D. Wilkinson for a Rehearing:

The opinion of the court rendered herein maintaining the plea of *res adjudicata* was in error as to the true facts of the case. To form the basis for such plea there must be a cause of action submitted to the court for its consideration; this cause of action must be pertinent to the issue, and must be the identical question before the court by parties acting in the same capacity. Collens vs. Jumel, 30 An. 861; West vs. Creditors, 3 An. 529; Cook vs. Doremus, 10 An. 679. In other words the decision must settle some question in dispute between the parties acting in the same capacity. Such is not the facts in this case.

In the judgment pleaded as *res judicata* the question of the proportion of the property owned by D. M. Giddens and the proportion owned by the minors was not submitted to the court, and it did not pass and could not pass on such question, for no

such issue was raised, nor did D. M. Giddens act in his individual capacity, but as tutor.

Again, the judgment of the probate court did not decree the minors the owners of the whole property received in exchange, nor did it decree in what proportions they held and owned said property.

This act of exchange admittedly includes property belonging to D. M. Giddens, and the act declares that said Sprowls place is transferred to D. M. Giddens in his "*own right and as tutor.*" "In his own right" certainly means that part of the property received belonged to D. M. Giddens, and an investigation of the source of title shows that D. M. Giddens is or was the owner of one-half of the property given in exchange.

Now this *act of exchange as made* was homologated by the judgment pleaded in bar—a judgment that was rendered more than *two years* after the exchange was made, and which purported to place a judicial sanction on a title *as it then stood* and no more. The judgment is as follows:

"In the matter of the tutorship of the minors of D. M. Giddens. Petition for homologation, etc. No. 68. In Red River parish, La. Probate docket.

"In this cause by reason of the law and the evidence it is ordered, adjudged and decreed that the proceedings and deliberations of the family meeting as convoked and holden on the ninth day of December, 1875, in the matter of the minors of D. M. Giddens, before W. P. Peck, recorder and *ex-officio* notary public in and for said parish and State, and in which it is advised and recommended that it 'is to the evident interest and advantage of said minors that said exchange be made upon the terms that one place—the Sprowls place, to-wit—be given in exchange for the other—the Armistead place, to-wit—on the condition that the mortgage and debt now held by Mrs. B. W. Lisso be assumed by Mr. J. H. Beaird, the party proposing the exchange, and the said father and tutor released therefrom, *said minors to hold and reserve any and all legal liens and rights they may have had in the Giddens-Armistead place, the same on the Sprowls place,* be homologated and confirmed, and made the final judgment of the court upon the ground and for the reason that said exchange was a legal and valid contract and was advantageous to

HARVARD LAW LIBRARY

Rawlins vs. Giddens et al.

the minors.' It is further ordered, adjudged and decreed that the *contract of exchange as executed and carried into effect, and bearing date December 20, 1875, and same being notarial in form, be homologated and confirmed*, and declared to be binding, of full force and effect against and between said minors and J. H. Beaird, and valid as a final and mutual title to each as to the places respectively conveyed."

* * * * *

It will be seen that this judgment declares "*said minors to hold and reserve any and all legal liens and rights in the Giddens-Armistead place, the same on the Sprowls place.*"

What right did they have in the Giddens-Sprows place? The judgment does not declare, and in order to ascertain this fact recourse must be had to the source of title to this property. If D. M. Giddens had no ownership of any part of the property received in exchange, why does the judgment declare that the minors' *legal liens* should be as operative on the one as on the other? If he was not the owner of any part of the property received, on what was the minors' legal lien to operate? The minors could not have a legal lien on their own property, and some part of it must have belonged to D. M. Giddens.

The judgment can not be construed by itself in determining this plea. It was a judgment homologating a written title of *two years'* standing and the deed homologated becomes and forms part of the judgment rendered.

The act of exchange transfers the property to D. M. Giddens in his own right and as tutor, and the judgment of the probate court gives judicial sanction to the transfer of the minor's interest. The question of the transfer of D. M. Giddens' interest was not before the court, and no judgment was needed to authorize its transfer.

Construing the judgment and the act of exchange together, the judgment only gives the minors an interest in common with D. M. Giddens in the property received. It created no new rights; it did not purport to destroy the title of Giddens and vest the same in the minors. *It homologated the act of exchange as it then stood*, which places the property in D. M. Giddens in his own right and as tutor.

The opinion of the court was delivered by

McENERY, J. The plaintiff instituted this suit against defendant D. M. Giddens for the sum of one thousand seven hundred and eight and 68-100 dollars, evidenced by a promissory note, dated May 14, 1892.

In the suit he made also defendants the two sons of plaintiff, Robert A. and Albert S. Giddens.

"Petitioner further alleges that said Albert Giddens, Robert Giddens and their father, D. M. Giddens have entered into a pretended settlement and transfer of property on the 28th of December, 1892, and filed of record that day in the clerk's office. Petitioner alleges that said pretended transfer and settlement and giving in payment is a fraudulent simulation, and that D. M. Giddens was not indebted to them in any sum after accounting for the improvements on said property, and for their raising, education and support. Petitioner alleges that all the property pretended to be transferred by above conveyance is neither the original property left by the succession of the mother of Albert S. and Robert A. Giddens, nor is it the product or increase of said succession property. Petitioner further alleges that if said D. M. Giddens was due them anything, that they had no mortgage or privilege on any of his property, nor was there any mortgage or privilege on any of the personal property described in the act of conveyance, and the transfer of the property for an indebtedness, if any existed, was null and void, because said Giddens was insolvent, and the said parties knew of his insolvency. Plaintiff alleges injury by this settlement and insolvency of the father, D. M. Giddens, and the same be avoided and annulled."

For participating in these alleged illegal acts and assisting their father in illegally disposing of his cotton, judgment is prayed for *in solido* against all the defendants. All the property embraced in the settlement is asked to be made subject to plaintiff's debt.

The defendant's two sons deny that they held said property by virtue of said settlement but by inheritance from their mother.

The case was tried by a jury, who returned a verdict for plaintiff against D. M. Giddens for full amount claimed on account, of five hundred and eighty dollars, and they also in the verdict declared D. M. Giddens to be the owner of one-third interest in the Sprowl place, and that said one-third interest should be subjected to the payment of plaintiff's demand. A judgment was rendered on this

Rawlins vs. Giddens et al.

verdict which departed in some respects from it. Defendants complain of this, but it will be unnecessary to comment on it, for the reason that the judgment rendered will be amended, dismissing the demand of plaintiff against defendant's sons, and releasing the property subjected to the payment of the judgment rendered.

The sons, R. A. and A. S. Giddens, appealed from the judgment.

The record is very large and encumbered with much useless matter. There was no necessity of introducing any evidence of title in the minors prior to the judgment hereinafter noticed which fixed the status of the property as theirs—i. e., the lands of their tutor, their father.

The mother of the two defendants, R. A. and A. S. Giddens, died. Her succession effects were inventoried and the father qualified as tutor. During the tutorship, seventeen years before the execution of the note sued on, in the interest of the minors, it became necessary to exchange the immovable property, which the tutor considered as their property, for certain other immovable property. A family meeting was convened, the proceedings regularly conducted, and a decree was rendered homologating the proceedings and approving of the exchange.

The decree concludes as follows: "It is further ordered, adjudged and decreed that the contract of exchange, as executed and carried into effect, and bearing date December 25, 1875, and same being notarial in form, be homologated and confirmed and declared to be binding and of full force and effect against and between said minors and J. H. Beaird, and valid as a mutual and final title to each as to the places respectively conveyed, and that the costs be taxed against D. M. Giddens, tutor, at whose instance this family meeting was convened. Done, read and signed in open court, on this 21st April, 1877.

"A. BEN. BROUGHTON, *Parish Judge.*"

This judgement is final, conclusive and irrevocable between the tutor and the minors. All the property received in exchange was the property of the minors. It is too late to inquire whether some of the property given in exchange belonged to the tutor. It passed from him, so far as creditors of the judgment debtor are concerned, whose debts originated after the decree. 44 An. 422.

A portion of the immovable property embraced within this decree, it is claimed by plaintiffs, was owned at the time by D. M. Giddens, the

tutor. But this is questioned, and the testimony of the tutor is that he took the title in his own name, but received the money to pay the price on account of the minors, from their grandmother.

One of the minors became of age and the other was emancipated during the tutorship. They had a right to demand an account from their tutor, and the delivery to them of property held for them.

The fact of the insolvency of the tutor is no evidence by itself that they colluded with him. The fact of insolvency alone would, or ought to, induce action on their part to protect their rights. That one of the minors was uneasy as to his rights some time before the final settlement, 28th December, 1892, is a fact established by the testimony.

Both, however, concluded to let their father manage the property for a while, in order to satisfactorily meet his obligations. He was unable to do so, and the settlement of 28th December, 1892, was the result. The evidence fails to establish any collusion between the tutor and the minors who had become of age to defraud the creditors of the tutor, or that they had been employed by him in diverting cotton from its proper destination to the furnisher of supplies.

D. M. Giddens' testimony as to the amount of cattle, hogs, horses, mules, etc., delivered to the minors is unaffected by plaintiff's evidence. They are in excess in some items of the amount in the inventory of the mother's succession. But D. M. Giddens shows that this excess was from natural increase, from selling old and purchasing fresh stock. In other words, the whole increase was produced from the minors' property administered by him. They are entitled to it. 31 An. 359; 42 An. 162.

Some of the items in the settlement are of articles returned in kind, and others of articles returned in kind for like articles consumed by the tutor.

In the settlement between the tutor and his wards there are alleged overcharges for rent, for the support and education of the minors, and a failure to charge for improvements placed on the minors' property. The plaintiff for these reasons charges that the tutor was not indebted to them. It may be true that the minors had no money demand against him in consequence of the statement of the account, but this is a matter between the tutor and the minors, who had attained the age of majority and were capable of remitting the

Rawlins vs. Giddens et al.

credits not mentioned in the account, and of accepting the overcharges for rent and support. But as the tutor only turned over to them the property of which they were the owners, the plaintiff was in no way injured by the settlement and has no cause to complain.

The tutor can not so manage and administer the tutorship as to bring the minors in debt to him, and so burden their property as to divest title in them and vest it in himself.

In the settlement made with his wards the tutor delivered to them property to which they were entitled and of which they were the owners.

He charges himself with rent for the entire period of the tutorship, but the settlement does not show that any rent was paid to the minors.

On the account or settlement there are two jennets and one colt, one mower and rake, and one lot cotton seed, valued at three hundred and seventy-five dollars.

It is admitted that the minors had no title to this property.

The tutor owed for rent. It was not offset by improvements sufficient to pay the same. They had a privilege on this property for the payment of the rent. They could have seized and sold it.

The plaintiff was not, therefore, injured by the delivery to the minors of property which was subject to their lessor's privilege, and from which there could be no surplus to pay any part of plaintiff's debt.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended so as to reverse that part of it which affects the title of the defendants, A. S. and Robert A. Giddens, to any of the property comprised in the settlement made with their tutor, D. M. Giddens, on 28th December, 1892, and which annuls and sets aside said settlement, and that part of the decree which invests ownership in D. M. Giddens of one-third interest in the Sprowl plantation, and the said A. S. and Robert A. Giddens are declared to be the lawful owners of all said property comprised and embraced in said settlement, and plaintiff's demand against them be rejected. In other respects judgment affirmed, plaintiff to pay costs of appeal.

MR. JUSTICE WATKINS recuses himself, having been of counsel in this case.

Rawlins vs. Giddens et al.

ON APPLICATION FOR A REHEARING.

NICHOLLS, C. J. The community between D. M. Giddens and his wife, Mary J. Armistead, has never been finally settled and liquidated, and the rights of the spouses fixed and determined. The separate creditor of either spouse has the right after the dissolution of the community to have the community liquidated and to subject according to law, to the satisfaction of his claim, the interest of his debtor thus ascertained. The plaintiff does not pretend to be a creditor of the community. If he be a creditor of Giddens it is for a claim which originated after the community had terminated, and the rights of parties had become fixed by the death of the wife. Even if the title to the property or part of the property involved in this litigation, fell into the community by reason of the time at which it was purchased, this creditor can not deal with an undivided one-half interest in any specific piece of property, as if the husband had the absolute ownership of one undivided one-half interest therein, proceed against it by direct seizure, sell it and apply the proceeds of the sale to the payment of his debt.

He has a remedy, but the remedy is not by direct seizure of an undivided interest in a specific piece of property. We think the interest of justice will be best subserved by setting aside the judgment heretofore rendered by us in this case, and said judgment is accordingly set aside, and it is now ordered, adjudged and decreed, the law and the evidence supporting this judgment and decree, that so much of the verdict of the jury in this case as "finds that D. M. Giddens owns one-third interest in the Sprowl place, excluding all movable property, and subjects said one-third interest to the payment of this judgment," and so much of the judgment of the District Court (based on that portion of the verdict) which decrees "that D. M. Giddens is one-third owner on the Sprowl plantation, and that the same be subject to the payment of plaintiff's claim, interests and costs," be and the same is hereby annulled, avoided and reversed. It is further ordered, adjudged and decreed that the portion of the judgment appealed from which decrees "that the transfer and settlement from D. M. Giddens to Albert A. and Robert S. Giddens, of date December 28, 1892, be avoided, annulled and set aside in so far as plaintiff's claim is affected by same" be and the same is hereby annulled, avoided and reversed and the case is remanded to the District Court for further proceedings according to law, the right of plaintiff being

HARVARD LAW LIBRARY

Gaslight Co. vs. City et al.

expressly reserved by proper proceedings to force a final settlement and liquidation of the community between D. M. Giddens and his deceased wife, Mary J. Armistead, and to subject to satisfaction, according to law, for his judgment, the interest of his debtor thus ascertained.

Rehearing refused.

WATKINS, J. recused.

No. 11,490.

NEW ORLEANS GASLIGHT COMPANY VS. CITY OF NEW ORLEANS
ET AL.

1. Act No. 106 of 1890, Sec. 26, requires in matters both of reduction and increase of assessments by the Committee of Revision of Assessments that the "Board of Assessors" should be heard before that committee reaches any determination in the premises. A formal notice such as is given to the individual tax-payer should in each case of proposed alteration be served upon that board, calling upon it to show cause why the alteration should not be made. It is the duty of the board to present a written answer in each case, giving its views in respect to the same explicitly and in detail. It is the duty of the committee to receive and file these answers, and after taking each into consideration, in connection with such other facts relative to the subject matter as may be before it, to reach a separate conclusion in each case and annex these answers to its report and forward them as part of the same to the Common Council.
2. The Committee on Revision should keep a record of all its proceedings, and of the evidence upon which it acted. The work of the committee is only by way of inquiry and investigation—its action is not final—its recommendations are submitted for approval or rejection by the council. It is the action of the council, not the committee, which determines what should be done with the special assessments designated. The council is expected to bring to bear both knowledge and judgment in its conclusions, and not merely register those of the committee, and this can not be done unless the latter communicates to it its reasons and the evidence upon which it acted. The report of the committee, both as to increase and reduction of assessments should have attached to it the affidavits of a majority of the committee "that the valuations fixed by it are the valuations provided by law."
3. In reporting back, at a date not later than the 18th of April as required by law to the assessors the report of the Committee on Revision, the action of the council on that report must be simultaneously reported.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Chas. F. Buck Attorney for Plaintiff and Appellant:
Revenue laws having for their object forced levies upon the property of the citizens are subject to strict construction.

Every provision of such laws which is intended for the protection of the tax-payer to insure justice and equality of taxation, is mandatory, and failure to comply with them imposes the penalty of nullity.

Such are the provisions of Sec. 26 of the Revenue Act No. 106, creating the "Committee on Assessment" of the City Council and defining its powers. The provision in said section that a majority of the committee shall attach their affidavit to the report which they are required to make to the City Council, applies to all their official acts in that regard, and is mandatory.

The law will presume that all the formalities prescribed for the assessment of property, have been complied with, but non-compliance, informalities or irregularities may be shown by evidence, and when so shown the assessments affected by them are null and void.

The Board of Assessors for the parish of Orleans, in all matters pertaining to assessments, can only act as a *Board*, and can not delegate any of its official duties to an employé whom it chooses to style "secretary." The act creating the Board makes no provision for a secretary.

The delivery of the report of the Committee on Assessment of the City Council to a person called the Secretary of the Board of Assessors, at 7:30 P. M. of the 18th of April of a given year, is not a delivery to the Board of Assessors at the time and in the manner prescribed by law.

A report presented to the City Council by a committee and recommended to the committee is not before the Council for final action, and when it is submitted to the Council at a subsequent meeting it is new matter, and must lie over for one week before final and legal action can be taken. Sec. 9, City Charter, Act 20, 1882.

The notice required by Sec. 26, to the tax-payer, of an intention to increase an assessment, must be of full three days, and it must state the property upon which the increase is to be made and the amount to which the assessment is to be increased; or, if not, when the tax-payer appears to show cause, as requested, he must be advised of the increase which is intended to be placed upon the property, in order that he may have a hearing thereon.

HARVARD LAW LIBRARY

Gaslight Co. vs. City et al.

Where the contemplated increase is on the value of a franchise, which valuation is ascertained by rules obviously different from those applicable to the assessment of tangible property, the presumption existing in favor of the correctness of the assessment made by the Board of Assessors is entitled to special weight, and this assessment should not be disturbed unless, on investigation, it appears affirmatively that the Board of Assessors have neglected or failed to make a correct assessment and that their assessment has been "imperfectly or improperly" made in the words of the statute.

The provision of the statute that, before such increase can be placed upon an assessment already made, "the Board of Assessors should be heard," means the Board of Assessors as a body, and the failure of the Committee and the Board of Assessors, as such, to co-operate in this respect, as required and intended by the statute, entails the nullity of the attempted change of the assessment.

Mere casual conversations had between members of the Board of Assessors and the Committee, especially where no member of the Board of Assessors was present when the final action upon the part of the Committee was had, is not the hearing and conference intended by law.

Evidence received without rejection, but otherwise bearing upon the controversy, will be given the same effect as if it were responsive to the direct affirmations or averments contained in pleadings. 16 An. 273.

A "franchise" is not personal property; it is an immovable, subject to mortgage, etc., and a notice, therefore, to show cause why the assessment on "personal" property should not be increased is not a notice embracing a franchise.

E. A. O'Sullivan, City Attorney, and *Geo. W. Flynn*, Assistant City Attorney, for Defendant and Appellee:

Act 106 of 1890, Sec. 26, does not require the affidavit of the Committee on Assessments of the City Council to their report in cases of increased assessments. The affidavit referred to in that section applies to cases of reduction of assessments solely, and not to the increase of assessments.

An affidavit to a report of a committee of the City Council is superfluous, inasmuch as the members of that body subscribed their oaths of office before entering upon their duties, as required under Sec. 4 of Act 20 of 1882, known as the city charter.

It is the action of the council that makes the committee report final, and it is the latter body, alone, who can object to omissions or informalities of the committee.

A party who appears before a committee, in answer to a summons, and makes no protest as to time, is subsequently estopped by his own action from setting up a plea that sufficient time was not given him.

There is no injunction on public officers to cease all official labor after office hours. An act performed by a public officer after office hours will not be stricken with nullity.

The law presumes that, in cases of taxation and assessment, all the legal formalities have been complied with. The evidence in this case shows that all the legal requirements were carefully adhered to.

The increased assessment placed upon "franchise" of the New Orleans Gaslight Company is fully justified by the evidence contained in the record. "Franchises" must be treated as personal property. All property not "real" comes under the head of "personal."

A resolution of the City Council, approving or rejecting the report of the Committee on Assessments, requires no ordinance or resolution having the form of law, within the meaning of Sec. 9 of Act No. 20 of 1882.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff alleges that in due time it made return for purposes of State and municipal taxation of its property, and that the assessment of all of its property, real and personal, and franchises was made and completed in regular and due course of law, as provided by the statutes, by the Board of Assessors, at a total valuation of two million two hundred and forty-four thousand four hundred and forty dollars; that while it considered this very high it did not protest, but accepted and acquiesced therein; that on the 6th of April, 1893, the corporation was notified through its president

to appear before a committee of the City Council styling itself the Committee on Budget and Revision of Assessments, on the 8th of April, 1893, at 11 o'clock A. M., pretending to act under the provisions of Sec. 26 of the revenue act of 1890, being Act No. 106 of that year, then and there to show cause why an increase should not be placed upon the assessment of its personal property over and above that made by the Board of Assessors; that it had no notice or information of any specific character as to the particular property upon which that committee proposed or intended to make an increase of assessment, but through the president it answered said notice in person, appearing before the committee on the date and at the time mentioned, when he was informed that it was intended to increase the assessment placed upon the franchise so called of the corporation by the sum of one hundred thousand dollars; that its president protested in the meeting of the committee against any increase, and after discussion he retired, but the action of the committee was not announced, nor was the corporation informed or notified what, if any, action the committee would finally take; that for the reasons above stated and the informal manner in which the committee proceeded, the Company had no opportunity to file any formal or written protest before it, but in view of the provisions of said Sec. 26, which require that the revision committee shall report its action to the City Council for approval or rejection, it addressed a formal written protest to the Mayor and Common Council in anticipation of a report that said committee might make against any contemplated increase; that they had no other means or opportunity than this to protest; that at a meeting of the City Council held on the 17th of April, being the same meeting at which the corporation's protest was presented, the Committee on Revision made a report containing simply the result of its conclusions on a large number of assessments under consideration, and stating the amounts to which they had increased or reduced various assessments without any other reason or explanation for its action, among which was an increase of one hundred thousand dollars on the franchise of the plaintiff corporation; that the City Council did not heed the protest, but approved the increase, and the same stands now assessed against it as a basis for State and municipal taxes for the year 1893; that the increase upon the valuation of the franchise in excess of its just and true value, which had been previously fixed by the Board of Assessors is absolutely wanton and arbitrary, ascer-

tained and adopted upon no rule or principle of computation, unjust and oppressive, for the reason that in making said increase on said franchise, the committee followed no fixed or general rule, but acted arbitrarily in reference to each and every corporation enjoying franchises of money value, reducing same and only increasing the present plaintiff corporation without basis or other rule of action than the arbitrary will of the committee; that as a matter of fact said increase is excessive in value and should be reduced to the amount originally fixed by the Board of Assessors upon the movable property and franchise, to the sum of one million seven hundred and ninety-six thousand six hundred and fifty dollars.

That the attempted increase is illegal, null and void, because the conditions provided by the law under which the power of the Committee on Revision or of the City Council arises did not exist; that under Sec. 26 of the Revenue Act, under which the committee acted, it had power to increase only assessments imperfectly or improperly made; that there was no notice, allegation or pretence that the said assessment was imperfectly or improperly made; that in fact the valuation of the Board of Assessors was fixed after full hearing, in regular form, in compliance with all the requisites of the law. That the said attempted increase was null and void for the reason that the committee did not comply with the requirements of Sec. 26, of Act No. 106 of 1890, particularly in this:

1. There was no hearing or conference between the committee and the Board of Assessors in reference to any contemplated increase by the committee, whereas the law expressly provides that the Board of Assessors shall be heard before any increase in valuation can be made and reported by the committee.

2. The action of the Committee of Revision, as well as that of the Common Council at its meeting on the 17th April, 1893, at which the report of the committee was received and approved, was absolutely null and void, because the said committee, or the members constituting the same, had not qualified as required by law for the purposes of acting as a Committee of Revision of Assessments, and particularly because the report of the committee did not contain the affidavit of the committee, or any members of the committee, or of a majority of the committee. That the failure on the part of the committee to attach their special affidavit to the report made to the council, as required by the twenty-sixth section of Act No. 106, and upon which

HARVARD LAW LIBRARY

Gaslight Co. vs. City et al.

report the council was required to act, either by way of approval or rejection, rendered the action taken absolutely null and void, and the increase referred to invalid and of no effect.

Plaintiff therefore alleges that the increased assessment of one hundred thousand dollars on the franchise or franchises should be canceled for the reason that the same is excessive, inequitable and unjust on its merits, and, secondly, that in any event the proceedings on the part of the Committee of Revision and of the City Council purporting to effect said increase, is null and void for the reasons above set forth and should be so decreed.

Plaintiff declares that it has paid the taxes of 1893 upon the assessment originally made by the Board of Assessors, reserving the right to make the present contest over the increase made. The prayer of the petition is that the Board of Assessors, the State Tax Collector of the First District and the city of New Orleans be cited, and that there be judgment ordering the cancellation of the increase upon the assessment of the franchise attempted to be made through the Committee of Revision and the City Council and decreeing the same in any event to be absolutely null and void for failure of compliance with the requirements of the law in the premises.

The city of New Orleans, after pleading the general issue, further answering, said that it acted under the provisions of law in increasing the plaintiff's assessment, because the assessment made by the Board of Assessors was insufficient in amount, which fact was within the knowledge of the committee on budget and assessment, and in making the supplemental assessment all the forms of law were complied with. It prayed for judgment declaring the supplemental assessment to be valid and dismissing plaintiff's demand.

The other defendants for answer filed a general denial.

Judgment was rendered in the District Court rejecting plaintiff's demand and the plaintiff has appealed.

The twenty-sixth section of Act No. 106 of 1890, referred to in the pleadings, is as follows:

"All tax-payers in the parish of Orleans shall have the right to appear before a standing committee on assessments of the City Council of New Orleans between the 21st of March and the 10th day of April, inclusive, of the year in which the assessments are made, and in the parishes before the Board of Reviewers, as provided for in this act, during the sessions of said board, and be heard concerning the

descriptions of the property listed and the valuation of the same as assessed, and they shall have the right of testing the correctness of their assessments before courts of justice in any procedure which the Constitution and laws may permit, but the action to test such correctness shall be instituted on or before the 1st day of November of the year in which the assessment is made. In all suits for the reduction of assessments the State Tax Collectors of the respective parishes shall be made parties.

"The said Committee on Assessments shall meet on the 21st day of March, or if a holiday, then on the next succeeding day not a legal holiday, of each year, in the city of New Orleans, to consider and examine into the applications of those owners of assessed property who believe the assessor's valuation to be in excess of and beyond the actual cash value of the property assessed. Said committee shall determine upon said applications, but their duties are confined entirely to the question of valuation and description, and report their action at once to the City Council for approval or rejection; said report to contain the affidavit of a majority of the committee that the valuations so fixed are the valuations provided by law, and decisions by the council shall be final unless set aside in accordance with Art. 203 of the Constitution. The said Committee on Assessments shall be, and are hereby empowered, to increase any assessment imperfectly or improperly made; provided, that before said increase is made the tax-payer be served with notice to appear before said committee within three days and show why such increased assessment should not be made. In passing upon any application for reduction in valuation, and before determining upon any increase in valuation, the Board of Assessors must be heard in reference thereto, and they are expected to be present at all sessions of the committee. No application to be considered by the said committee unless said application has been first made to the board and refused. In all cases the action of said committee to be finally reported back from the council to the assessors, not later than the 18th of April, or the revision to be null and void."

On the 6th of April, 1893, the Committee on Assessments served on the plaintiff a notice to the following effect:

"You are hereby notified, pursuant to the provisions of Act No. 106 of the General Assembly of 1890, Sec. 26, that this committee proposes to increase the assessment now placed by the Board of

HARVARD LAW LIBRARY

Gaslight Co. vs. City et al.

Assessors on your personal property situate in the Fifth Assessment District, and to show cause on the 8th day of April, 1893, at 11 A. M., why the said increase should not be made."

No notice of this proposed action appears to have been given to the Board of Assessors.

On the 11th of the same month the plaintiff addressed the following communication to the Mayor and Common Council of the city:

"GENTLEMEN—About ten days ago the president of the New Orleans Gaslight Company was served with a notice purporting to come from the Committee on Revision of Assessments to appear before it and show cause why the assessment upon the property of the New Orleans Gaslight Company should not be increased. I appeared before the committee protesting against any increase, and expressing my willingness to accept as final the assessment made by the Board of Assessors, although even that was higher than it should be.

"I have not been officially advised of any action on the part of the committee, but learn that the committee has undertaken to increase the assessment on franchise one hundred thousand dollars, and that its report is before your honorable body for approval or rejection, as per Sec. 26 of Act No. 106 of 1890. I deem it my duty, both, by reason of my conviction of the wrong contemplated by this increase of assessment, and for the purpose of reserving the legal rights of the New Orleans Gaslight Company, to contest the same before the courts, to solemnly and earnestly protest against this assessment, and ask its rejection by your honorable body. The Sec. 26 above referred to gives your committee and yourself the power to increase an assessment 'imperfectly or improperly made.' It was not contended that there was an imperfect or improper assessment, and no investigation was had developing any facts justifying the increase attempted by your committee. The same is purely arbitrary and without foundation of fact to stand upon. And your petitioner further represents that it is utterly null and void and illegal, as not coming within the power of your honorable body through your committee, under the text of the law, and for other reasons which will be duly urged if this protest is unheeded and petitioner compelled to resort to the courts of law."

This communication was submitted to the City Council by the Mayor at its session of April the 18th, and immediately referred to

the Committee on Revision of Assessments. No further notice or action upon it seems to have been taken by the council.

The council had in the meantime held a session on the 11th of April, at which the "Committee on Revision of Assessments" made a report containing changes made by it in the matter of ninety-five assessments.

The report having been received, was recommitted to the committee under the rules.

On the 18th of April the council, at its session of that date, took up the report of the committee, and the same was as a whole adopted without discussion, a motion to take up and consider the various items of the report separately having been lost.

The chair then instructed the clerk of the council to deliver the report of the Committee on Revision of Assessments, taking therefor the receipt of the secretary of the Board of Assessors, which was done, as the minutes of the proceedings of that day contain a copy of the receipt for the same by Fendel Horn, signing as secretary of the Board of Assessors.

The Board of Assessors had held a session itself on the 18th, but had adjourned after having authorized and directed Mr. Fendel Horn to receive the report from the council.

Our knowledge of what took place at the various sessions of the "Committee on Revision of Assessments" is of the most meagre kind, and derived entirely from the testimony taken on the trial of this case, the committee evidently not considering itself called upon to keep any record of its proceedings, or to assign any reasons in making its report to the Common Council as to the evidence upon which it acted or the grounds upon which it proceeded.

We think it very clear that the Board of Assessors was never officially notified that the committee proposed to increase or alter its assessment of the plaintiff's property, and called upon to show cause, if any, it had why this should not be done, and that the only action taken in the matter, so far as the State assessors were concerned, was through informal desultory conversations with the president of that board, or some of its members. The statute of 1890 requires, both on matters of reduction and of increase of assessment, that the Board of Assessors should be "*heard in reference thereto*" before the revision committee reaches any determination in the premises. We are of the opinion that a formal notice, such as

is given to the individual tax-payer, should in each case of proposed alteration be given to the Board of Assessors, and that it is the duty of that board, in each case, to make a reply in writing, giving explicitly and in detail its views in regard to the alteration and the reasons and grounds upon which these views are based; that it is the duty of the revision committee to receive and file this answer, and after taking it in consideration, in connection with such other facts relative to the subject matter as may be brought before it, to annex it to its report, and forward it to the Common Council as part of the same.

Knowledge of the Board of Assessors brought to it through the mere presence of either all or some of its members at sessions of the committee is something other and different from the knowledge of the board conveyed to it through formal notice. The presence of the board at the meeting is suggested by the law as a thing proper to be done, but it is not exacted, while notice is a matter of obligation, as is the duty of the board to reply to the notice.

We think the revision committee greatly erred in supposing it was under no obligation to keep a record of its proceedings and of the evidence upon which it acted. It is very true the statute does not in terms order it so to do, but the obligation to do this results from the nature of the duty it was performing.

Any action which the committee might take would not be final. Its work was purely by way of investigation and inquiry. Its recommendations had to be submitted for rejection or approval to the council, and it was the conclusions reached by the council, not those of the committee, which determined whether particular assessments should be changed or not. The Common Council was not to be a mere automaton in this matter and called upon only to authenticate what the committee had done, but it was expected itself to bring to bear both knowledge and judgment in the premises.

It is impossible for it to do so when the committee fails to communicate to it any of the reasons and any of the evidence upon which its recommendations rest, and only forwards to the main body conclusions of its own and not facts. We think the report which the committee filed should have been accompanied by the affidavits of a majority of the committee to the fact "that the valuations fixed by it are the valuations provided by law." We see no reason why a distinction should be made in this respect between a report calling for reductions of assessment and those calling for an increase. If the oath

taken by the members of the committee as members of the council was deemed a sufficient guarantee for the fidelity of their official action as committeemen in the case of increase, as suggested by defendants, it certainly should neither be less nor more so in the matter of reductions. The General Assembly has thought proper to require an additional oath, probably so as to thoroughly and forcibly impress them with their special and direct responsibility for the matters placed in their charge. We think it intended this affidavit should be made by the committeemen whether their report was to reduce or to increase assessments.

Though the General Assembly did not find occasion to repeat or reiterate these requirements it is clearly and easily inferrible from the text and context, when construed together, that such was the legislative purpose and intent. Only one single report is spoken of by the statute and to this single report the affidavit is ordered to be attached.

We took this same view in *State vs. Lochte*, 45 An. 1045, where an argument very similar to that which is now urged by defendants was pressed upon us. In the absence of the affidavit and of the declaration certified to by a majority "that the values as fixed by the committee were those provided by law," and in the absence of any evidence or reasons, the committee was free to change arbitrarily of its own will, or through favoritism, dislike or prejudice such assessments as it might select for that purpose. In the case at bar the Common Council without any basis whatsoever, except the bare report itself of the committee, fortified neither by affidavit, certificate, declaration, reasons or testimony, took up and adopted as a whole, without investigation or examination, so far as their proceedings show, ninety-five alterations of assessment made by the committee, most of them reductions. Such a condition of things was not contemplated by the General Assembly. In examining the proceedings of the council of the 18th of April we notice that the paper delivered to the secretary of the Board of Assessors by the clerk of the council was simply the report of the Committee on Revision of Assessments. When the statute required the action of that committee to be reported back from the council to the assessors not later than the 18th of April, it contemplated that the action of the council on that report should be reported back as well as the report itself. The report *per se*, as we have said, has no official force. The Committee

Bank vs. Irvine.

on Revision of Assessments of the Common Council and the Common Council itself, have in their course and action departed so widely from that pointed out by law as that under which they were to act that that action can not be sustained or maintained. We do not mean to intimate that an increase of plaintiff's assessment could not properly and justly have been made and to the extent which it was made by the committee and the council, or that either acted oppressively or arbitrarily, but both were called to act under limited powers and under express limitations and restrictions. Where powers conferred by statute have not been exercised under the circumstances and requirements of the statute, the acts done fail for want of authority, even though they would have been sustained as right had legal conditions as to action been complied with.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the action of the Committee on Budget and Revision of Assessments increasing the assessment for the year, 1893, upon the franchise of the plaintiff corporation, and the action of the Common Council of the city of New Orleans in adopting the said action of the said committee, contained in its report to said council, be and the same are declared null and void, for failure by both the said committee and the said Common Council to comply with the requirements of the law in respect to the revision of assessments, and it is further ordered that the Board of Assessors cancel on their books or records the said attempted increase of assessments upon the plaintiff's franchise.

No. 11,461.

CITIZENS BANK VS. JOHN F. IRVINE.

Where the owner of property seized and sold by the Citizens Bank in enforcement of calls for contribution on stock indebtedness, secured by a stock mortgage on the same, is not the owner of the shares of stock, but a third possessor not personally bound, his consenting to have executory proceedings directed against himself as actual possessor of the land, instead of against the original subscriber and his heirs, and his becoming the adjudicatee of the property, which was entirely for cash, did not make him a stockholder in the bank, and liable for future contributions. The sale of the stock under proceedings, directed against himself, was that of the property of a third person, without process of law, and an absolute nullity. The ownership of the stock remained after the adjudication where it was before—in the heirs of the original subscriber. *Pepper vs. Dunlap*, 9 Rob. 283; *Hare vs. Nevill*, 3 An. 326.

Bank vs. Irvine.

In selling the land entirely for cash on the defaulted calls for contribution, the bank exhausted its mortgage claims on the property (there being no loan mortgage), and the purchaser on paying the purchase price held the property free from mortgage.

A PPEAL from the Thirteenth Judicial District Court, Parish of West Feliciana. *Brame, J.*

S. McC. Lawrason Attorney for Plaintiff and Appellant:

"Shares or interests in banks and other companies of commerce or industry are considered as movables." C. C. 466.

Title is acquired by prescription in three years when possession has been in good faith, except where the thing be lost or stolen; in ten years without title or good faith. C. C. 3472, 3475; 31 An. 228; 35 An. 779, 781; 42 An. 729.

In executory process "improper service or lack of service" is prescribed by five years. C. C. 3542, 3543; 24 An. 24; 33 An. 1043; 28 An. 569; 34 An. 209; 39 An. 67; 4 Otto, 6.

"The property banks in Louisiana furnish an exception to the rule that the creditor who holds under two mortgages of unequal rank on the same property, and who has caused the property to be sold to satisfy his junior mortgage, can not be allowed to sell it a second time to satisfy his senior mortgage." 14 An. 237; 15 An. 630.

The Citizens Bank issued no certificates of stock to mortgage stockholders whose shares were not paid up, and probably never will be.

Want of actual seizure by the sheriff is cured by prescription of five years. *Evans vs. Pike*, 4 Otto, 6.

It is unnecessary to hold a stockholder that he should have been given possession of stock, or notified of transfer to him; the registry of his name on the stock book is sufficient. 10 Ind. 499; 3 Woods, 55; 16 Mass. 94; 22 N. Y. 551; 47 Iowa, 575; 24 Me. 273; 64 Cal. 117; 105 U. S. 217; *Keyser vs. Hitz*, 133 U. S. 138.

Acts of ownership through a long period of years, in which that ownership has not been disturbed, will estop the purchaser at a judicial sale from questioning it.

One who knowingly purchases property from which there was danger of eviction can not, under the law, and until evicted, refuse to pay price. 7 An. 94; *Voorhies* C. C., Art. 2557.

Bank vs. Irvine.

A purchaser whose fears of being disquieted arise from a naked point of law will not have relief under Art. 2557 C. C. *Hodge vs. Moore*, 3 Rob. 400.

The Citizens Bank of Louisiana could sell stock of its mortgage stockholders who no longer met the conditions required by law of stockholders, in such manner as it deemed best. Charter of Bank and Act Amendatory. Acts of 1835, approved March 19; Acts of 1878, No. 45.

One can not, in attacking the validity of a judicial sale, elect to consider it valid for that which he considers advantageous, and invalid as to the rest.

W. W. Leake Attorney for Defendant and Appellee:

A sale of property under an order of seizure, after the mortgage debtor has died without making the heirs or legal representatives parties, is an absolute nullity. 22 An. 20; 30 An. 84; 31 An. 372; 28 An. 348; 29 An. 262; 37 An. 866; 41 An. 420.

The stock mortgage in favor of the Citizens Bank of Louisiana does not give a pledge. 42 An. 730.

Prescription, in cases of nullity or rescission of an agreement, commences, in case of error or deception, from the day on which either was discovered. R. C. C. 2221; 34 An. 917; 38 An. 772.

Parol evidence is admissible to show inducement to contract. *Kelly vs. Carter*, 55 Ark. 119; 17 S. W. R. 706.

Thos. J. Semmes and *Henry Denis* submitted a brief on the Application for a Rehearing.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 27th of February, 1838, Robert McCausland mortgaged certain property in the parish of West Feliciana to secure two hundred shares of the capital stock of the Citizens Bank of Louisiana, to which he had subscribed.

He died in 1851, and his wife in 1853.

McCausland had living in 1879 two children and several grandchildren, minors.

At a probate sale made in the succession of McCausland in 1852, C. B. Chinn purchased the plantation.

Bank vs. Irvine.

The other property (excepting the Citizens Bank stock) was *partitioned in kind*.

The defendant, Irvine, bought the plantation at a sale made in the matter of the succession of Chinn, on the 19th September, 1872.

Neither McCausland nor his heirs were called upon to pay contributions upon the stock until 1878, when the bank proceeded, by seizure and sale, to sell the shares of stock (then reduced to one hundred and eighty-six shares, under the operation of the statute of April, 1853) belonging to McCausland, and the land mortgaged to secure the same. McCausland's heirs were not cited or notified in said proceedings, which were directed against John F. Irvine, the present defendant, as being at that time the actual possessor of the property. At the sale, Irvine became, on the 15th of November, 1879, the purchaser, for the price of eight hundred and thirty-five dollars.

In the present suit, the bank alleging that Irvine became on the date mentioned the owner by purchase at the sheriff's sale made in the matter of the Citizens Bank of Louisiana vs. Robert McCausland and John F. Irvine, of one hundred and eighty-six shares of mortgage stock of said bank, the property of Robert McCausland (defendant in said suit), seized and sold therein; that the Citizens Bank had called for the following contributions, to-wit: two dollars per share, payable on the 1st day of December of each of the years 1881 to 1891 inclusive—has sued defendant as the owner of said stock for the sum of four thousand four hundred dollars and interest, as an amount due by Irvine for such contributions. Plaintiff also prays for the recognition of the special mortgage securing the said shares of stock, and for the seizure and sale thereof to pay said contributions, reserving all its rights against defendant for the balance and sums which will hereafter fall due on said shares of stock.

Defendant pleaded the general issue and specially denied that he was a stockholder, or that he ever assumed the liabilities of a stockholder of the Citizens Bank. He averred that the pretended seizure and sale of one hundred and eighty-six shares of mortgage stock of the bank belonging to McCausland, and the adjudication to him of said stock was an absolute nullity, and said pretended sale should be annulled, for the reason that Robert McCausland and wife died many years prior to said pretended seizure and sale in 1879, leaving children and grandchildren in Louisiana and Texas, and these heirs were

Bank vs. Irvine.

never made parties, nor was any notice served on them; that the sheriff never saw and never had actual possession of the certificates of stock belonging to McCausland; that possession of said stock was never given to defendant, nor was he ever notified of any transfer on the books of plaintiff. He avers that on the day of sale, November 15, 1879, and prior thereto, it was distinctly agreed and understood between defendant and the attorneys of the bank in the suit of the Citizens Bank of Louisiana vs. Robert McCausland and John F. Irvine, actual possessor of the land, that defendant was not to assume any of the responsibilities of a stockholder of said bank, and in bidding in said stock he was in error, and deceived by the representations and assurances of the attorneys representing the bank in said case.

Defendant also pleaded the prescription of three, five and ten years.

Judgment was rendered in the District Court in favor of the defendant. Plaintiff appealed, and specially pleads in this court the prescription of three, five and ten years to defendant's demand to set aside the sale.

At the time of the sale in November, 1879, in the proceedings of the Citizens Bank vs. Robert McCausland and John F. Irvine, the latter was the owner of and in possession of the property which had been mortgaged by McCausland to the bank under and through the probate sales which had been made, as has been stated, first in the successions of McCausland and later in the succession of Chinn.

The stock had not been sold at either of these sales and *quoad* that stock Irvine stood only as the owner of and in the possession of the property which had been mortgaged to secure it. He had assumed and was under no personal liability in regard to that stock when he bought the property from the succession of Chinn.

On the 15th of November, 1879, the date of the sale made by the bank under the executory proceedings referred to, the ownership of the shares of stock and that of the real estate was in different hands; the heirs of McCausland *still remained the owners of the stock*, but the real estate had by the probate sales mentioned become the property of and was in the possession of Irvine. Under the special legislation relative to the Citizens Bank the property, though sold, was, for the purpose of the enforcement of the rights of the bank, to be dealt with as if still held by McCausland, and proceedings under executory pro-

Bank vs. Irvine.

cess were to be carried on on that theory, regardless of the intermediate sales. This method of proceeding had been granted by way of benefit or privilege to the bank, but in the particular case the privilege would have been an actual burden, as McCausland had died, and to have made his heirs parties would have entailed both expense and delay. In view of the fact that the land had been sold in the McCausland succession and the heirs had ceased actually to have any interest in the property or to be concerned in after proceedings respecting it, the bank, with the consent of Irvine, the then owner and possessor, directed the executory proceedings which it instituted against Irvine, and contradictorily with him as the only defendant a sale took place at which Irvine became, as we have seen, the purchaser, for the price of eight hundred and fifty dollars cash.

Irvine gave a qualified consent to this proceeding, evidenced by the following endorsement upon the petition in the case:

"Service of the within petition and order accepted, notice and citation waived, and I agree and consent that executory process issue without further forms, processes or delays, and that the property mortgaged may be seized and sold on November 20, 1879.

(Signed)

"J. F. IRVINE."

At this sale, not only was the real estate mortgaged sold, but with it was also sold one hundred and eighty-six shares of the capital stock of the bank.

The terms of sale were cash, and the value of the entire property offered for sale was fixed by the appraisers at one thousand two hundred and fifty dollars.

The amount of the stock subscription of the McCauslands, as reduced, was eighteen thousand six hundred dollars. The particular proceeding directed against Irvine was in enforcement of past due calls on that subscription amounting to five hundred and fifty-eight dollars, with interest.

We are of the opinion that Irvine's obligation, as resulting from his purchase of the land, was limited to the purchase price.

There was, as against the land, only one single claim—that securing by mortgage the stock subscription. It is true that simultaneously with the granting of the stock mortgage, there was granted a loan mortgage of even date, to secure amounts which it was assumed might possibly be borrowed by McCausland, but this mortgage was one of the

HARVARD LAW LIBRARY
JAN 11 1895

Bank vs. Irvine.

class permitted to be given by Art. 3292 of the Civil Code to secure an obligation not yet risen into existence, but which, as declared by Art. 3293, is realized only in so far as the obligation for which it prospectively provides shall afterward actually arise. It was a mere contingent mortgage, which never came actually into life, for the reason that McCausland never obtained any money on the strength of his stock, and the land was sold without the privilege of borrowing having ever been utilized.

There is no question in this case of a sale by the bank under a senior mortgage and its effect upon a junior mortgage in its own favor, therefore the decisions quoted from 14 An. 237, *Haynes vs. Harbour*, have no bearing.

The case at bar is simply that of a mortgage creditor proceeding upon his claim by executory proceedings against the mortgaged property, asking that it be sold entirely for cash, and so selling it. There can be no question in law as to the effect of such a sale upon the property and upon the purchaser. The creditor, by his course, exhausted his rights against the property, and the purchaser, by paying the purchase price, complied fully with all the legal obligations flowing from his purchase. If the creditor was entitled to demand that the property should be sold for cash to meet the past due calls, and on credit to meet such additional future calls as might be due to the bank on the stock indebtedness and mortgage, and subject to the original stock mortgage to secure such calls, he should have claimed and obtained a recognition of that right, and the property should have been advertised to be sold and sold on those terms, but it did nothing of the kind. The reason why this was not done is very clear, for with such a heavy liability resting on the property and the purchaser, no purchaser other than the bank itself could have been found. The only alternative left to the bank was either to purchase itself and then sell on private terms, free from all claims, or to find in advance a purchaser at a suitable price, and then sell the property at judicial sale, in manner and terms as was actually done in this case.

We have so far been, intentionally, separating Irvine's rights and obligations, as a purchaser of the land, entirely from those which resulted or could result from the sale of the stock.

We now pass to that matter.

It will be seen at once that Irvine occupied a very different posi-

Bank vs. Irvine.

tion toward the stock at the time the executory proceedings were taken out from what he did toward the land; and the position of the McCauslands was also entirely different as to the two. The McCauslands had the ownership of the stock and a legal interest in judicial proceedings in regard thereto and no ownership and no legal interest in the land and the judicial proceedings in respect to it. Irvine, on the contrary, had the ownership of the land and an interest in the proceedings relative thereto and *none whatever* in regard to the stock. The bank was authorized to deal and was safe in dealing in regard to the land with Irvine, who was its actual owner and possessor; but the bank and Irvine had no right whatever to deal with each other in respect to the sale of the stock. Irvine as to that stock was completely a third party and a stranger.

Proceedings carried on contradictorily with Irvine leading up to a sale were absolute nullities—the adjudication conferred no title—the sale was that of a third person without due process of law, and the stock remains to-day as it was before, the property of the McCausland heirs. It will not do to say that the McCauslands will never claim the stock—that it is worthless—that it no longer represents a right, but exclusively evidences a liability. We have legally to deal with the stock as that of third persons, which has been attempted to be sold in judicial proceedings to which they were not parties.

Plaintiff claims that Irvine adheres to the sale of the land as made under the executory proceedings and repudiates the sale of the stock. It must be borne in mind that at the time of these proceedings Irvine was actually the owner of the land and he is its owner now. The effect of the sale under the executory proceeding as to Irvine was not as between the bank and himself to give him a new title—it simply operated to clear off an existing encumbrance upon the property; the proceeding as to its effect was rather an extinction of a mortgage by payment than a purchase.

The sale of the land was legal—the sale of the stock illegal—Irvine had the right to claim the benefits of the one and to reject the liabilities of the other. We do not think the pleas of prescription filed by the plaintiff well founded. For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

MILLER, J. recused.

HARVARD LAW LIBRARY

Bank vs. Irvine.

ON APPLICATION FOR REHEARING.

In the brief of counsel on application for rehearing it is said: "Counsel for the Citizens Bank do not question the conclusion of the court that the sale of the stock of the bank attached to the McCausland plantation is void, but they respectfully suggest that the sale of the plantation under the proceedings taken by the bank in 1879 is also void. The court rests the validity of the sale on the consent of the bank. * * *

"We respectfully suggest that the Board of Directors of the Citizens Bank never expressly or impliedly consented to a sale of the plantation separate from the stock, and therefore both the sale of the stock and the sale of the plantation are void.

"A decree that Irvine is not liable for contributions on the stock because the sale of the stock was a nullity would meet the case presented by the pleadings. Whether Irvine acquired a title to the plantation free from the stock mortgage is a question not raised by the pleadings.

"The court has, however, passed upon that question in its opinion. We respectfully suggest that the exigencies of the case are met by deciding that Irvine is not personally liable for stock subscriptions, and when the bank shall hereafter proceed to enforce the stock mortgage against the plantation the effect of the judicial sale made in 1879 can be more satisfactorily determined, and hence the court should reserve so important a question for final determination when that question becomes the vital point in the case and is thoroughly discussed by counsel."

The prayer of plaintiff's petition in the case is as follows:

"Petitioner prays that John F. Irvine may be cited to answer hereto; that after due proceedings judgment may be rendered in its favor against said defendant for the amount of said contributions, to-wit: Four thousand four hundred dollars, with interest as aforesaid, *with a recognition of petitioner's mortgage on the property herein described to secure said stock and the contributions aforesaid*, and that said tracts of land may be sold to satisfy as far as they will the judgment herein by preference. Petitioner reserving all its rights against defendant for the balance and sums which will hereafter become due on said shares of stock."

It will be seen that the plaintiff claimed not only a personal judgment against Irvine as being personally liable for the contributions

Bank vs. Irvine.

on the stock, but a judgment recognizing, contradictorily with him *as a stockholder and as a purchaser of the land under and through its proceedings against him in 1879, a stock mortgage* on that property.

The court below and this court had to pass upon and dispose of the whole of the prayer, not only as to Irvine's personal liability, but also as to *this claimed stock mortgage on the land*. In disposing of each of the two claims reasons had to be assigned. When the court rejected plaintiff's prayer for a recognition of the stock mortgage on the land owned by the defendant, it did not, as counsel say, pass upon a question not raised by the pleadings. In dealing with that question we had to consider the claim in the light in which and under the circumstances in which it was presented to the court. Under what circumstances was this mortgage claimed? Was it under and through proceedings against the McCausland heirs or against Irvine as *strictly a third possessor* of the land holding no privity with the asserted mortgage? By no means. The claim was advanced directly against Irvine himself as a *stockholder* and as having as such *personally assumed the reversion* of the stock mortgage. The whole theory of plaintiff's case is that Irvine is the owner of the land *not under the two succession sales*, but under the sale made in the executory proceedings of the plaintiff in 1879.

We reasoned as to the existence of a stock mortgage from that standpoint presented by the plaintiff itself, and from it held it to be impossible for plaintiff to have sold the land *in the manner and on the terms it did* and to still retain a mortgage on the land. Plaintiff in its pleadings and its prayer maintained that it *COULD DO SO*. It did not ask the nullity of the sale.

So far from asking the nullity of the sale of the plantation by it to Irvine, its whole demand and prayer was based upon the existence and the legality of that sale. *We could not have decreed the nullity under any prayer of the plaintiff, nor could we do so under defendant's pleadings and prayer*. Defendant was already the owner of the property, though under a different title derived through the succession sales mentioned. There was no necessity for him to ask for a decree setting aside the sale by the bank to him. It would not have been to his interest to do so, and should the plaintiff bring the action against him which the brief hints at, he will, no doubt, vigorously oppose the action. The decree of nullity of the sale of the plantation which counsel suggest as that which should have been rendered

HARVARD LAW LIBRARY

Dean & Cazenavette vs. Beck.

would have been not a decree under the pleading, but entirely outside of them and directly against those of the plaintiff itself.

We did not intend to express an opinion and we expressed no opinion as to what the rights of parties would have been had an action of a different character from that actually brought been instituted, nor what would be those rights in case of a future action of a different character. Those matters are for future adjustment. We intended to deal and dealt only with the issues presented in this particular case, under its pleadings and prayer. Those we had to dispose of, as we have said, in their entirety. What we decide in this case are those issues—none other. Nothing that we have said could or should be construed to go beyond this.

Rehearing refused.

No. 11,395.

DEAN & CAZENAVETTE VS. THEODORE A. BECK.

Where, pending a lease, work has to be done which should have been done prior to the lease in order to place the building leased in the condition in which it should have been to fulfil the lessor's warranty, that it was fit and appropriate for the known use to which it was to be applied, the lessee has a legal right to a dissolution of the lease.

The extent of the work to be done and the extent of the inconvenience to be suffered by the lessee do not control the rights of the lessee as to a dissolution. The warranty is indivisible.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

H. E. Upton and Lloyd Posey Attorneys for Plaintiffs and Defendants in Reconvention, Appellees, cite C. C., Arts. 2692, 2695, 2698, 1934; 43 An. 817; 6 An. 487; 14 An. 564.

Denegre & Denegre Attorneys for Defendant and Appellant, cite C. C. 2700, 2697; 9 An. 527; 33 An. 1343; 12 An. 823; 6 An. 279; 17 An. 321; 11 An. 695; 37 An. 532.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 3d of November, 1890, the defendant leased to the plaintiffs for a period of eleven months, commencing

Dean & Cazenavette vs. Beck.

on the 1st of November, 1890, certain property in the city of New Orleans for the sum of twenty-two hundred dollars, payable in monthly instalments of two hundred dollars each, represented by promissory notes of the lessees, endorsed by Paul Conrad.

The lessees took possession of the building, but after occupying it for a short time left the same and instituted the present suit for a dissolution of the lease, and claiming eight hundred dollars as actual and ten thousand dollars as exemplary and punitive damages against the defendant.

Defendant resists the demand, and admitting that plaintiffs have paid the first month's rent reconvenes, praying for a judgment for two thousand dollars as still due under said lease and on said notes against the plaintiff and Paul Conrad, who on their prayer was made a party to the suit. The case was tried by a jury, which returned a verdict in favor of the plaintiffs for the sum of one hundred dollars, and also in their favor on defendant's reconventional demand. Defendant appealed.

Plaintiffs allege that about the 1st of November, 1890, they formed a copartnership with the object and purpose of carrying on the business of warehousemen; that they required for said business a suitable building; that they found what they considered a suitable location for conducting it, not having before engaged in that business, at Nos. 59 and 61 Decatur street, the property of the defendant; that they called on him and were by him informed that the house and premises were particularly fitted, eminently proper and thoroughly safe for said business; that the building was so strongly constructed that it could bear all the weight of all the goods of any character whatever that could be stored there; that under such a statement and owing to the safe appearance of the house, it being lately built, they rented the same and commenced business, after fitting up the establishment with furniture and tools and elevator at considerable cost.

They aver that the building and premises were wholly unfit and dangerous for the purpose and business for which they were rented to them by the defendant, and that he well knew that it was unsafe, unsound and unfit both in foundation and superstructure for the business, and he falsely and purposely misrepresented the facts, misleading them into the belief that the premises were in every respect adapted and perfect for the said business of a warehouse for sugar

Dean & Cazenavette vs. Beck.

and molasses, and thus by fraud and bad faith on the part of defendant they were prevailed upon to enter into said contract of lease.

That they began business under the most favorable auspices and with the brightest prospect of success.

That after they had received nine hundred sacks of rice, one hundred and nineteen hogsheads of sugar, one thousand four hundred and fifty barrels of sugar and one thousand one hundred and fifty barrels of molasses, weighing altogether about one million five hundred and fifteen thousand two hundred and fifty pounds, over one-half of which was stored on the basement floor, they were suddenly forced to stop receiving and storing goods because the building proved unable to support the said weight and began to sink and give way, and it became at once apparent that it was unfit and useless for a warehouse; that in the meantime they were obliged to refuse offers from various parties to store sugar and molasses, more than sufficient to fill the premises, because of the defective and dangerous condition of the building.

That it got out of level, and its foundations gave way owing to the defective condition and construction of the same, and they were obliged to discontinue their business altogether; that notwithstanding efforts on their part they were unable to find any other building convenient and suitable for their business, and through the malicious and false representations of the defendant they were deprived of the means of conducting a business which would have been very lucrative and would have yielded them during the term of the lease, including the term for which renewal had been stipulated therein, at least ten thousand dollars net.

That they notified defendant without delay that they considered the lease null and void by reason of said defects and unfitness, and that they would vacate the premises and hold him for damages; that they had complied with all their obligations under the lease, having paid the first month's rent, which they were entitled to recover; that by reason of the sinking of the building they were compelled to notify all the owners or their agents of the goods stored with them to remove the same, and they had refused to pay the storage due at the time on the same, which amount, as well as the labor therein, they were entitled also to recover.

Answering the charges made in the petition, defendant, after denying generally all plaintiff's allegations, says that the premises

rented were not improper, unfit, unsafe or unsound; that they were examined by the plaintiffs before the lease was entered into, and if any damage or inconvenience was caused plaintiffs it was because of their own reckless, negligent and improper use of the premises.

That through some unforeseen event some of the posts holding up a part of the building sank a few inches, but the flooring did not fall in or give way; that immediately upon being notified of the fact they had the proper repairs made with as little inconvenience as possible to the plaintiffs and all were done and completed inside of eight days. That he offered to allow a rebate in the rent for the time and space occupied while the repairs were going on, but plaintiffs refused to consider the question and claimed excessive damages.

The questions we have to decide are, first, whether the plaintiffs having leased the premises described in the petition and taken possession of the same were justified in subsequently vacating the building under the circumstances disclosed in the record, repudiating the contract and claiming damages from defendant, or whether the latter be entitled to rent, and if so, to how much rent.

The plaintiffs maintain (and the testimony of Dean and Ker sustain the contention) that prior to leasing the property several interviews took place between the parties at which the lessor was advised of the business upon which plaintiffs were about to enter, the uses of the building which they sought to lease and the character of the building needed for that purpose; that the defendant represented to them that his building would meet the necessities of the case and was what they needed; that they entered into the contract of lease relying upon the correctness of these representations, which subsequent events showed to be untrue. The defendant denies that any such representations were made, but his own testimony is not as positive or emphatic and direct as it should have been. The reference made by him prior to the lease of the storing capacity of the Kelly building, which he evidently admitted very reluctantly on cross-examination, indicates that the subject matter of the capacity and strength of his own building was under discussion and this reference was made clearly in incidental support of the merits of his own building. Defendant's answer contains a declaration that he rented the "warehouse" to the plaintiffs, and this allegation sustains plaintiffs in their position as to the knowledge of the defendant of the contemplated use of the building and its lease *as a warehouse*.

HARVARD LAW LIBRARY

Dean & Cazenavette vs. Beck.

Plaintiffs took possession of the premises about the 10th of November and immediately commenced business as warehousemen for sugar, molasses and rice. The building was at no time completely filled. The precise distribution of what they did have on hand on the 10th of December is shown neither by plaintiffs nor defendant; sugar and molasses are said to have been stored in some places two tiers high, and in others three, but the exact place where this was is not disclosed. The building is a long one with nine supporting posts distributed lengthwise through the centre and resting on brick foundations of uniform size and character.

On the morning of the 10th of December the three back posts were observed to have settled considerably, bringing down correspondingly, the flooring with them and the portion of the roof over them. Plaintiffs at once notified the defendant of the situation. Workmen were immediately sent to the building, under direction of an architect, who "prized up" and took out the flooring near these posts, as well as the posts themselves. The foundations on which these three posts rested were taken out and made deeper and broader. A portion of the wall, which had "bulged" somewhat, from the sinking of the posts, was straightened; the posts were replaced and the roof raised to its original position. Only eight or nine days were consumed in this work, but plaintiffs had made up their mind to throw up the lease and vacate the premises. Owners of the property on storage were called on to withdraw the same, and as soon as this was done plaintiffs left the premises, after notifying the defendant and tendering him the keys of the establishment. Defendant refusing to receive the keys, they were left at a corner store subject to his orders. We may here say that after some delay defendant took the keys, and in July occupied a portion of the building for his own purposes. We may also say here that in the meantime the defendant unsuccessfully attempted to lease the building for account of the plaintiffs.

Considerable testimony was taken in the lower court as to the weight a building should be able to bear per square foot in order to be held and considered a building proper and suitable for warehouse purposes, and as to whether the particular house leased to plaintiffs came up to the required standard. As might be expected there was a difference of opinion on that subject. The jury adopted the views

of the plaintiffs' witnesses on both points, and we can not say they erred.

It is very certain that defendant, when he sent his workmen to the building after the sinking spoken of, caused the foundations on which the posts rested to be made very considerably deeper and broader, thereby recognizing the *necessity for a change*. This change was not confined to the particular post under which it is claimed a soft spot, up to that time unknown (occasioned by the existence there at a former time of a well), was discovered, but extended to all three of the posts at the back end of the building. There was some claim that plaintiffs had overloaded the building, but the answer ascribes the sinking, not to this, but to an "unforeseen event," which defendant's testimony points out as the "soft spot" just mentioned. Even if the building was overloaded beyond its actual bearing capacity, there is nothing to show that it would have been overloaded had that capacity been up to standard requirements.

Defendant claims that the work called for by the sinking of the posts was in the nature of *repairs* and not *reconstruction*; that plaintiffs were put to no serious inconvenience, as they were not forced to leave the house; that the repairs worked an interruption (such as it was) of plaintiffs' business for only eight or nine days; that the building, except at the particular place where the sinking took place, was stanch and strong, and that the partial trouble gave no right to a dissolution of the lease, but at best to a reduction of rent. He relies particularly upon Art. 2700 of the Civil Code. The work done in this case was work which was necessary to have been done prior to the lease in order to have placed the building in the condition in which it should have been, to fulfil defendant's warranty that it was fit and appropriate for the known use to which it was to be applied. This warranty is indivisible. *Caffin vs. Redon*, 6 An. 488. The work itself was a *betterment*, not mere *repairs*, and could only be done *during the lease*, subject to plaintiffs' legal rights in the premises. The rules referred to by the defendant are not applicable under the conditions of this case. Defendant contends that plaintiffs inspected the building themselves prior to contracting and recognized in the act of lease it was in good condition.

The building was a *new one*—the condition referred to was the outward apparent condition. The foundation under the posts which gave way or sunk were hidden from view. It is claimed that

Meyer & Bro. vs. Rothschild & Co.

the real motive of the plaintiffs in asking a dissolution of the lease is to be found in the failure of their business venture independently of the building. That may well be, but if the circumstances of the case justified an abandonment of the premises, their motives in exercising the legal right do not affect the situation.

We think the jury erred in condemning the defendant to pay plaintiffs one hundred dollars. If plaintiffs have suffered any damage in this matter the proximate cause thereof is not due to the defendant. For the reasons herein assigned, it is ordered, adjudged and decreed that so much of the verdict of the jury as condemns the defendant to pay the plaintiffs one hundred dollars, and the judgment of the court below based on said portion of the verdict, be and the same is hereby annulled, avoided and reversed; the verdict and judgment otherwise are hereby affirmed. Defendant to pay the costs of the lower court, plaintiffs and appellees to pay costs of appeal.

No. 11,397.

A. MEYER & BRO. VS. M. H. ROTHSCHILD & CO.

No valid sublease of premises can be made without the consent of the lessor, when the lease prohibits the subleasing of the premises without the lessor's consent.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

Lazarus, Moore & Luce Attorneys for Plaintiffs and Appellants.
Henry C. Miller submitted a brief on same side.

Farrar, Jonas & Kruttschnitt Attorneys for Defendants and Appellees.

The opinion of the court was delivered by

McENERY, J. The plaintiffs leased the building No. 100 Canal street in the city of New Orleans from the agents of the owner, a non-resident. The agents were Robinson & Underwood of the city of New Orleans.

46 1174

49 1551

46 1174
120 1093

The lease contained the stipulation that the property could not be subleased without the owner's consent.

Plaintiffs sue the defendants for the price, upon an alleged verbal lease made on 10th of August, 1892, for the unexpired term of their lease for the price of five thousand two hundred and fifty dollars.

The defendant, M. H. Rothschild, had negotiated with the attorney of A. Meyer & Bro. for the unexpired term of the lease.

Security was demanded from Rothschild, who was either unable or unwilling to give it.

On the 10th of August an agreement was reached by which the defendant consented to take the unexpired term by paying in advance, with a discount of eight per cent. He declined to take the premises after the agreement, hence this suit. The defendant denies that there was any valid contract of lease.

It is evident that no valid lease could be made without the consent of the original lessor.

This was never given. Underwood, of the firm of Robinson & Underwood, emphatically states that he had declined to accept the defendants as lessees without security, and they were never tendered as lessees with the required security.

The attorney for A. Meyer & Bro. proposed the names of several responsible parties to Underwood and asked him if he would accept them as security. He assented, but says the security was never tendered.

In reference to the agreement made by the attorney with Rothschild about paying in advance, with eight per cent. interest discount, he says that he has no recollection of any such proposition having been made to him. He is a disinterested witness and was sworn in plaintiff's behalf. He being a real estate agent, it is reasonable to suppose he would have positive knowledge of a fact which it was essential for him to know, in order to give his assent to the subleasing of the premises. He says the manner in which it was brought to his knowledge before the 10th of August agreement was when he was asked by plaintiff's attorney if he would not at any time accept the cash, if it could be discounted, but he never mentioned Rothschild's name. The question seems to have been hypothetical. It is not shown that Underwood was made acquainted with the note of discount, or that any definite understanding was ever made with him to accept defendants as lessees on any particular condition.

HARVARD LAW LIBRARY

Roman & Guerriero vs. Their Creditors.

As the consent of Robinson & Underwood, the owner's agents, was essential to a sublease of the premises, it is certain that the agreement between the attorney and defendants was without effect, as this consent was wanting.

In a brief opinion the District Judge says that the verbal agreement between plaintiff and defendant is clearly proved, but the concurrence of the two wills was not sufficient to impart vitality to it without the consent of Underwood & Robinson, the agents of the original lessor. Their consent was essential to the perfection of the contract of lease, and that neither plaintiff nor defendant could supply the missing link.

It does not appear that Robinson & Underwood were even made acquainted with the 10th of August agreement. Underwood says positively it was never submitted to him for his ratification or rejection, and that he has never consented to the subleasing of the premises to the defendants.

Judgment affirmed.

MILLER, J., having filed brief before his appointment takes no part in the decision.

Rehearing refused.

No. 11,451.

ROMANO & GUERRIERO VS. THEIR CREDITORS.

The placing by the insolvent, without intent to defraud, on his schedule claims which do not exist, and amounts which are to some extent exaggerated, does not amount to a fraud against other creditors within the meaning of the insolvent laws. The claims of these creditors are mere matters of legal right, subject to be disputed or controverted in the *concursus*.

In an accusation of fraud made against the insolvent, he has the right to trial by jury.

No opposition to a voluntary surrender, charging fraud, can be filed after the lapse of ten days next following the meeting of creditors.

The maxim *Contra non valentem agere non currit prescriptio* does not apply to the prescription of ten days for filing oppositions to a voluntary surrender.
11 An. 86.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

46 1176
50 321

E. H. McCaleb, Jr., Attorney for Insolvents and Appellants:

Fraud must be specially alleged and proved beyond doubt. The onus is upon the opponent who alleges that certain claims are fictitious.

On opposition to insolvent's discharge; when evidence is admitted, under objections, for the purpose of showing fraud, a judge is incompetent, *ratione materiæ*, to consider such evidence. Upon overruling the objection a jury must be impaneled to try the opposition. 3 La. 217; 16 La. 348; 18 La. 383, 495; 7 An. 258; 14 An. 516; 17 An. 85; 9 La. 387.

Dinkelspiel & Hart Attorneys for and Opponents and Appellees:

The opinion of the court was delivered by

MCENERY, J. On the 26th December, 1892, the plaintiffs filed a petition, annexing thereto a schedule of their affairs, and prayed for a meeting of creditors and a discharge from their liabilities. The usual orders were granted, the meeting of creditors held, a syndic appointed, the insolvents' estate was administered, and they were discharged by a vote in number and amount from their liabilities. The syndic presented his account for the final distribution of the assets in the insolvents' estate.

On the 20th February, 1893, certain creditors opposed the syndic's account and the discharge prayed for the plaintiffs on the following grounds:

1. That the plaintiffs did not receive the affirmative votes cast at the meeting of creditors, for their discharge, of a majority in number and amount.

2. That the schedules herein filed by the plaintiffs do not correctly represent their assets and liabilities; that many of the names placed therein as creditors are not creditors, or if creditors at all, for amounts less than given and voted for; that the plaintiffs have not accounted for all their assets, but on the contrary have omitted a large quantity thereof from their schedules; that a few days before their surrender the plaintiffs purchased from the N. O. Auction and Commission Co., Limited, one of the opponents, lemons to the amount of four hundred and fifty-six dollars, and never accounted for the lemons or the proceeds of their sale; that also,

Roman & Guerriero vs. Their Creditors.

within a short time before their failure the plaintiffs purchased a large quantity of peanuts of the value of one thousand five hundred dollars, and never accounted for them or the proceeds of their sale; that they also purchased from Seinsheimer Paper Company, of Cincinnati, under same circumstances, a large quantity of paper, for which they never accounted.

3. That the plaintiffs did not keep proper books and did not turn over their books to the notary appointed by the court to conduct the insolvent proceedings.

4. Opponents oppose the vote of A. Xiques for the discharge of the plaintiffs on the ground that as voting as agent of a creditor he had no personal knowledge of the indebtedness.

5. The opponents oppose the votes cast by certain named creditors because they were not creditors of the plaintiffs for the amounts stated.

There was judgment in favor of opponents, Hills Bros. & Co., placing them on the account as ordinary creditors against the city of New Orleans, dismissing its opposition, and as thus amended the account was approved and homologated, and the funds ordered distributed accordingly.

It was "further ordered, adjudged and decreed that the opposition of the New Orleans Auction and Commission Company, Limited, and others be maintained, and the application for the discharge of the insolvents, Roman and Guerriero, is refused at their cost."

The controversy is in relation to that part of the judgment refusing to discharge the insolvents.

It was based on the alleged frauds of the insolvents prior to the filing of their petition and the surrender of their property, in order to obtain the benefit of the insolvent laws.

The judgment does not deny the claims of the creditors alleged by opponents not to be creditors of the insolvents, and who voted for their discharge.

The claims of these creditors are mere matters of legal right, subject to be disputed or controverted in the *concurso*. Their mere appearance on the schedule does not amount to a fraud against creditors within the meaning of the insolvent laws. *Montilly vs. Creditors*, 18 La. 383.

The evidence does not show that these creditors were placed on the schedule with the intention of defrauding other creditors, nor is

Roman & Guerriero vs. Their Creditors.

there any reason to believe that the creditors were injured by the mere statement on the schedule of the amount due these creditors. If the amounts were not due at all, or some of them exaggerated, both of which are alleged, the errors could have been easily and promptly corrected in the *concurso*.

The *proces verbal* of the notary shows that a majority in number and amount voted for the discharge of the insolvents.

The *proces verbal* makes a *prima facie* case for them, and we do not think the evidence in the record is sufficiently convincing to destroy the effect of the votes cast by the five creditors who it is alleged were not creditors for the amounts stated, and the votes of the twenty-six creditors who are alleged to be the creditors of the individual members of the insolvent firm.

The specifications contained in numbers two and three are embraced within the definition of fraud in Secs. 1802, 1803 of the Revised Statutes. The fraud specified in these sections must be distinctly and positively particularized in the opposition, and if it be sustained by proof, the insolvent is punished by being debarred forever from the benefits of the insolvent laws, and incurs the penalty of imprisonment for a term not exceeding three years.

Section 1802 of the Revised Statutes says: "Should any creditor of an insolvent debtor deem it necessary to oppose the appointment of a syndic, or to charge fraud against the debtor, he shall, within the ten days next following the meeting of creditors, lay before the court his written opposition, stating specifically the several facts of nullity of the appointment or fraud alleged against the insolvent debtor. Whereupon the judge shall decide said opposition, and in case of accusation of fraud, after having received the insolvent debtor's answer, the court shall order a jury to be summoned for the purpose of deciding on the accusations."

The plaintiffs were entitled to have the accusation of fraud made against them referred to a jury. *McCloskey & Co. vs. Ingram*, 17 An. 85; *Besle vs. Creditors*, 14 An. 522; *Thompson vs. Chapman*, 7 An. 258.

The opponents failed to charge fraud against the insolvent within ten days after the meeting of creditors, as required by Sec. 1802, R. S.

No opposition charging fraud to a voluntary surrender can be filed after the lapse of ten days next following the meeting of creditors,

HARVARD LAW LIBRARY
JUN 11 1894

Fredericks vs. Railroad Co.

although the creditors did not know of the fraud complained of within that time. *Mathews & Finley vs. Creditors*, 11 An. 36.

In the case cited the reasons for excluding the maxim *Contra non valentem agere non currit prescriptio* from the application to the ten days' prescription for filing oppositions in insolvent proceedings are fully and sufficiently stated.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended so as to reverse that part of it which refuses to discharge the insolvent plaintiffs, and it is now ordered that they be discharged. In all other respects the judgment is affirmed, the insolvent's estate to pay costs.

No. 11,493.

JOSEPH FREDERICKS VS. ILLINOIS CENTRAL RAILROAD COMPANY.

1. The possessor of lands or tenements is not at liberty to plant in them *dangerous instruments*, which may seriously injure trespassers, but he is under no duty to keep his premises in a *safe condition* for other persons than those whom he invites—and, consequently, he is not liable to trespassers for injuries they may receive from defects *not amounting to traps* in such premises.
2. If a person allows a *dangerous place to exist on premises occupied by him*, he will be responsible for injury caused thereby to any other person entering the premises by invitation or procurement, express or implied. The question of importance, then, is whether the place was dangerous *per se*; and was its situation such as to operate an invitation to trespassers?

A PPEAL from the Civil District Court, Parish of Orleans.
Theard, J.

Fenner, Henderson & Fenner and *W. B. Spencer* Attorneys for Plaintiff and Appellee:

In the exercise of a franchise to lay tracks upon a public street or highway, a railroad company owes to the inhabitants thereon the duty to lay them in such a manner as to interfere as little as possible with their equal right to the enjoyment of the street or highway, and so as to make the use of the highway as little more dangerous or inconvenient as possible.

Whoever does anything in or immediately adjacent to the public street calculated to attract children of the vicinity into danger which they can not appreciate, owes the duty of protecting them by suitably guarding the source of danger.

46 1180
117 325
46 1180
1121 303

Fredericks vs. Railroad Co.

In a suit for damages for the negligent construction of a track across a street of a city, evidence that the track was constructed in accordance with plans and specifications furnished by the City Engineer is irrelevant.

The care and caution required of a child is according to his or her maturity or capacity, to be determined in each case by the circumstances of the case.

Under the circumstances of this case the verdict was not excessive.

Farrar, Jonas & Kruttschnitt Attorneys for Rosetta Gravel Company, Defendant and Appellant:

Defendant had a right to show that the structure in question was built in accordance with the plan approved by the City Council and the City Surveyor.

The structure complained of was not unlawful, and was not dangerous *per se*.

The structure complained of was in a place where no foot passenger had a right to cross the gutter, and the defendant was under no obligation to make a crossing for foot passengers where the law contemplated that there should be none.

On the facts shown by the plan and photographs, the structure was not an obstruction to the highway and was not dangerous.

The burden of proof was on the plaintiff to show that his child was not guilty of any negligence leading to her injury.

A child 7 years and 7 months old is, by law, presumed to be able to take care of itself, in so far as its ability to walk across a hewn beam twelve inches wide over a ditch four feet wide is concerned.

The evidence shows that the child in this case could not have been injured except by its own gross carelessness and negligence.

Fenner, Henderson & Fenner and *W. B. Spencer* on Application for a Rehearing:

In the latter portion of its opinion it would seem that the court deemed this a case for the application of the principles of law governing the right of a man to construct dangerous instruments on his own premises, and his obligations to trespassers for injuries which they may receive from such dangerous instruments.

HARVARD LAW LIBRARY

Fredericks vs. Railroad Co.

The case of O'Connor vs. R. R. Co., 44 An. 339, is cited as establishing that "the possessor of lands or tenements is not at liberty to plant in them dangerous instruments which may seriously injure trespassers; but he is under no duty to keep his premises in a safe condition for others than those whom he invites; and, therefore, he is not liable to trespassers for injuries they may receive from defects not amounting to traps in such premises." Now, we respectfully submit that this case, and this proposition of law, can have no possible bearing upon the instant case. Surely, Louisiana avenue does not belong to the defendant corporation; the avenue can not be said to be the defendant's private premises. The plaintiff's child was surely not a trespasser. The defendant's obligations in this case can not certainly be fairly measured by those of a man to a trespasser upon his own private premises.

With due respect we submit that right here is disclosed the fundamental error of the court's opinion—the failure to recognize the extent of the public's right as respects a highway, and the corresponding obligation of the defendant corporation to the public, and especially to the families of the vicinity. The principle for which we contend is tersely stated in the case of the City of Indianapolis vs. Emmelman, 108 Ind. 530: "Whoever does anything in or immediately adjacent to the public street, calculated to attract children of the vicinity into a danger which they can not appreciate, owes the duty of protecting them by suitably guarding the source of danger." It seems to us plain that any prudent man might have foreseen that the children of the neighborhood would use this culvert as a crossing. It seems to us equally plain that it ought to have been manifest that this use would result, as it did, in serious personal injury, and such being the case the defendant ought to have covered it.

The opinion of the court was delivered by

WATKINS, J. This is an action in damages, and the defendant, the Rosetta Gravel, Paving and Improvement Company, is the sole appellant from the verdict of the jury and the judgment of the court *a qua* thereon based, for the sum of fifteen hundred dollars—the Illinois Central Railroad Company and the New Orleans Belt Railroad Company having been discharged from liability.

Fredericks vs. Railroad Co.

This suit is brought by the plaintiff for the use of his minor child, who suffered serious injuries, as the result of a fall through an open culvert, part of a switch track, connecting the yards of the defendant with the main belt road track on Louisiana avenue, the averment of the petition being that, in the construction of this switch track, the defendant dug a deep trench, or excavation, on the south side of said avenue, in order to obtain earth to make an embankment on which to lay its track, and same was permitted to remain open, notwithstanding the duty was imposed on the company to restore the street to its original condition.

The further averment is made that, in the laying said switch track from the main line to the company's private yards in the vicinity, it became necessary to lay it across the said trench or ditch, which is several feet deep and several feet in width, and that the place where it crosses this ditch is near the place where the crossing for pedestrians is constructed. That the only crossings over that ditch are such narrow plank walks as have been placed over it by the people living in the neighborhood for their own convenience. That this switch track over the ditch is laid on an open culvert consisting of cross-ties of about eight inches in diameter, laid about two feet apart and at right angles with the avenue, the culvert being about eight feet in length and on a level with the street.

That the spaces between the cross-ties are not covered or closed, and the culvert is in no way guarded or protected so as to prevent children or other persons from falling into same, as they are liable to do in crossing from one side of the avenue to the other.

That said open culvert is a dangerous trap to wayfarers passing that way.

It is alleged that on or about the 16th of September, 1892, at about 4 o'clock P. M., plaintiff's daughter, a child of seven years and seven months, left his house on the north side of Louisiana avenue, to go across the street to the home of one of her playmates on the south side of the avenue, as was her custom to do; that taking the most direct route she went diagonally across the street, and on reaching the first place where she could cross the ditch, she attempted to cross over the trestle, fell, and striking against the sharp edge of one of the cross-ties received serious injury.

Grounded on this statement of fact, the charge is made by the plaintiff that, in the construction and maintenance of an open cul-

HARVARD LAW LIBRARY

Fredericks vs. Railroad Co.

vert, over a deep ditch, on a street in a populous part of a city, in close proximity to the houses of the citizens, and in a place frequented by children of all ages, and used by them as a play-ground, and lying in their customary path across the street, the defendant was guilty of gross negligence, and a wanton disregard of the equal rights of every inhabitant therein to the undisturbed enjoyment of the street.

The only question of fact that the defendant controverts is that with reference to the digging of the trench and leaving it open, the fact being that the ditch had been dug by the city and had been in use by the city as a drain some time prior to the building of the switch track, and thus necessitated the defendant to construct the trestle over it.

This is not denied, but admitted by the plaintiff. Practically all of the other allegations of the petition are undenied.

The question at the threshold is whether this statement makes out a case of negligence on the part of the defendant.

The counsel for the defendant puts the question thus: "The only point of alleged negligence against the defendant is that the spaces between these broad cross-ties ought to have been filled in so as to make a passage-way over the gutter where none was intended by law, and where people, as a rule, had no business or right to cross.

"There are street crossings on every street at the crossings. The gutter in the middle of the street is not a normal place to cross, and it is not expected that anybody will cross there."

Again: "There was no such passage-way over this gutter at this point before this structure was erected. It was not intended that there ever should be any passage-way at this point. Our structure was not intended as a passage-way for foot passengers, and they had no right to cross the street at this point when it was not contemplated that foot passengers should cross.

"We were, therefore, under no legal obligation to provide a safe passage-way over a place where the law provided none.

* * * * *

"If the defendant in this case is guilty of any negligence, then every person who lays a twelve-inch plank across a gutter in the city of New Orleans for his own convenience, with the consent of the city, is liable for negligence to any person who undertakes to walk that twelve-inch plank, and missing his footing falls in."

The culvert in question was a ditch or drain which had been constructed by the city, and had been in use by the city long prior to the time of the construction of the trestle or culvert in question. That ditch or drain is just such as exist in all parts of the city for like purposes. The switch track turned out from Louisiana avenue in a curve, crossing this ditch in the direction of the defendant's private grounds. The place of the intersection of this track with the gutter was neither in the street nor in the crossing or foot path on the side of the street. The track was between the two, and impeded the use of neither in any manner. To all appearances the street was left just as free for the use of vehicles, and the sidewalk and crossing of the gutter just as free for the use of pedestrians, as before the defendant's culvert was constructed over this gutter. Consequently there is no causal connection between the two—the structure complained of not being *in the street or sidewalk adjacent to the street*.

On the contrary, the evidence shows, and the fact is, that there was a good crossing over the gutter, within a few feet of this switch-track crossing, and it was the legal and commonly used foot path for *all pedestrians*, and the switch track did not lie in the customary path of pedestrians going across Louisiana avenue. Therefore this structure could not have been built "in wanton disregard of the equal rights of every inhabitant thereon, to the enjoyment of the street," as plaintiff alleges it was.

The case cited by the plaintiff from Hawkins' Pleas of the Crown (404) was that of digging a ditch *in a highway*, making a hedge over it, or by laying logs of timber *in it*.

The case cited from Wood on Nuisances (Sec. 258, 266) 19 L. J. C. P. 195, is that of an unauthorized *excavation in or near a highway*.

The case cited from 1 Rorer on Railroads (546) 29 Conn. 434, is that of leaving *impassable obstructions, or an open culvert in a public road*.

The case cited from 5 Dillon (96) is that of a railroad company making an *excavation in a street* and leaving it unguarded, whereby children may be injured.

The case from Pierce on Railroads (248) 8 Allen 560, is that of a railroad company causing defects or leaving obstructions *in a highway*.

The case stated in Wasmer vs. Railroad Company, 80 New York,

Fredericks vs. Railroad Co.

212, is one of the company failing to place planking or filling on the side of the rails at a crossing. 65 N. Y. 561.

The case of *City of Indianapolis vs. Emmelman*, 108 Ind. 530, was that of the city making an *excavation in a street*, at a place where it knew children living in the vicinity were accustomed to play, and where they had a right to be at all proper times without being intruders on the premises.

In our opinion neither of these cases meet the requirements of this case, because of the fact that the structure of the defendant was not built *in the street or sidewalk*, and was constructed in a good, substantial manner. There was nothing in the structure within itself to tempt children to it, or to induce them to use it. In putting a crossing over the gutter for its use and convenience, the defendant did no more than the citizens residing in the community did for their convenience and utility.

There are, doubtless, similar gutters in all parts of the city; and if every one who puts a bridge or walk over one of them for use or convenience becomes liable for the happening of any accident or injury that may occur to any chance pedestrian who may use it, at any time, a strange condition of things would in all likelihood take place.

But the defendant did not act capriciously. It placed this culvert where it did from the sheer necessity of its situation, and in constructing the switch track as it did, it apparently did the best thing for the community in not putting same in either the street or sidewalk, and thus avoiding trespassing on the rights of any one, or disregarding the equal rights of every inhabitant of the city to the undisturbed enjoyment of the street and banquette as well as of the crossing.

In thus constructing this switch track crossing, the defendant did not put it "*in a place frequented by children of all ages, and used by them as a play-ground*," because their play-ground was on a square of ground near by. This switch track was not built "*in their (the children's) customary path across the street*," because the evidence shows and the proof is that the customary path of children, as well as of adults, was over the crossing near by—a covered and safe crossing of the gutter established by the city. Indeed, the proof does not show that the children of the neighborhood who were accustomed to

Fredericks vs. Railroad Co.

assemble on the adjacent square for purposes of play had ever been accustomed to use this switch track crossing at all. On the contrary, we gather from the evidence that this crossing was rarely used in this way and the incident under consideration was exceptional.

Evidently this is not such a case as that plaintiff's counsel cite from *Judson vs. Railroad Company*, 29 Conn. 434, as will appear from the following extract from his brief, viz.:

"A railroad company constructed its road across the main street of a village, about a foot and a half above the level of the street. The street was twelve rods wide, with two traveled paths on each side of the street, and an open common between. The company was required by its charter to restore any highway intersected, so as not to impair its usefulness. The company put the two traveled tracks in proper condition for passing with vehicles, but made no other crossing. About midway between the two paths they constructed a culvert under the timbers of the track to let the water accumulating from rains pass through, which was left uncovered. A person walking across the street upon the railroad track, at a time when the culvert was filled with snow and could not be seen, fell into it and was injured.

"Held—That the railroad company was liable for the injury." In their opinion the court ask: "Why should not the defendants place the whole of the highway, as well as a part of it, in such a condition that it could be safely and conveniently used by the people? Why leave in it anywhere uncovered ditches and culverts, so far rendering it unsafe for foot people to pass along or across it?"

As will appear from the facts recited *supra* this is a very different case.

The case of *McCloughey vs. Finney*, 37 An. 27, cited in plaintiff's brief, is one of an accident happening to a small boy passing along the banquette in front of a feed store on Poydras street, in the city of New Orleans, from a sack of corn which fell from the top of a pile of corn that had been placed on the banquette by the defendant.

The case of *Railroad Company vs. Stout*, 17 Wall. 657, is one involving the condition and management of its turn-table, constituting it a dangerous machine.

In *O'Connor vs. Railroad Company*, 44 An. 339, we held, upon the examination and citation of a great many decisions and opinions of

HARVARD LAW LIBRARY
JUN 10 1894

Fredericks vs. Railroad Co.

text writers, that the possessor of lands or tenements is not at liberty to plant in them dangerous instruments, which may seriously injure trespassers; but he is under no duty to keep his premises in a safe condition for others than those whom he *invites*; and therefore he is not liable to trespassers for injuries they may receive from defects *not amounting to traps* in such premises.

That was the case of a little child who had resorted, in company with other children, to the yards and premises of the defendant for purposes of play, and was injured by a coal dump of peculiar construction which was left standing on its track.

After quoting with approval from a decision of the Massachusetts court—Coombs vs. New Bedford Co., 102 Mass. 572—to the effect that “if a person allows a *dangerous place to exist in premises occupied by him*, he will be responsible for injury caused thereby to any other person entering the premises *by his invitation or procurement, express or implied*,” we made this inquiry in the O’Connor case: “With reference to children of tender years, it may be conceded that they *proceeded with due care*, but can it be said that the condition of defendant’s fence operated as an ‘invitation or procurement, express or implied?’ ”

In that case a verdict in favor of plaintiff was reversed.

The instant case is easily distinguished from the case of Westfield vs. Levis, 43 An. 67, as in that case the negligence of the defendants was fully established—they having left a heavy iron roller, with two mules attached thereto, unattended by a driver, on an open, public street; the mules not fastened and the wheels of the roller unlocked.

The petition in this case alleges that the switch track of the defendant was constructed “under and by virtue of Ordinances 4884 and 5822, C. S.,” and consequently same was authorized. And the petition further recites that, in constructing and maintaining an open culvert in a deep ditch in a street in a populous part of the city—one dug or excavated by the company in order to obtain earth to make an embankment—the company was guilty of negligence, but this state of facts is not borne out by the record, as has been already stated.

It is our opinion that the negligence of the company is not made out, and that the judgment should be reversed.

Leman vs. Life Insurance Co.

It is therefore ordered and decreed that the verdict of the jury and the judgment thereon based be annulled and set aside; and it is further ordered that there be judgment in favor of the defendant, rejecting the plaintiff's demands in both courts.

Rehearing refused.

No. 11,427.

MRS. CAROLINE LEMAN VS. THE MANHATTAN LIFE INSURANCE
COMPANY.

46	1189
48	1804
46	1189
106	205
46	1189
112	577

In an action on a life policy, proofs of loss, stating suicide as the cause of death, are admissible, but not conclusive against the assured. Bliss on Life Insurance, Sec. 265; 142 U. S. 699; 22 Wallace, 36; 26 An. 404.

In such action, when the defence is self-destruction, the burden of proof is on the insurer to establish the suicide, and when circumstantial evidence only is relied on, the defence fails, unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another. Bliss, Secs. 366, 367; 47 N. Y. 52; 26 An. 404.

No such exclusion of any hypothesis save suicide can be predicated on the mere fact of the dead body of the person insured found with a mortal wound from a gunshot, the discharged pistol wedged on the thumb, "as if thrust in forcibly," and there being other circumstances inconsistent with self-destruction.

A PPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

A. H. Leonard and Morris Marks Attorneys for Plaintiff and Appellant:

Where the dead body of an insured is found under such circumstances and with such injuries, that death may have resulted from negligence, accident, homicide or suicide, the presumption is against suicide as contrary to the general conduct of mankind and a gross moral turpitude. May on Insurance, p. 459, Sec. 325; 47 N. Y. 52; Guardian Ins. Co. vs. Hogan, 50 Ill. 35; 127 U. S. 667.

The burden of proof is on an insurance company when it alleges that deceased committed suicide, and the evidence must exclude all other reasonable hypotheses. Circumstantial evidence which does not exclude all other reasonable hypotheses proves nothing. 26 An. 405, Philipps vs. La. Eq. Co.; 142 U. S. 691, Home Benefit Ass'n vs. Sargent; 85 N. Y. 317, Penfold vs. Universal Life Insurance Co; 20 F. R. 662, Edwards vs. Travelers' Insur-

HARVARD LAW LIBRARY

Leman vs. Life Insurance Co.

ance Co.; 47 N. Y. 52, Mallory vs. Insurance Co.; 30 Hun. N. Y. 535, Germain vs. Brooklyn Life Ins. Co.; 9 S. W. R. 812, Mutual Life Ins. Co. vs. Davies; 16 S. W. R. 723, Accident Ins. Co. vs. Bennett; Am. Digest 1890, p. 2046, No. 497; Am. Digest 1891, p. 2399, No. 451; 29 F. R. 198, Keels vs. Mutual Res. Fund Life Ass'n; 47 F. R. 272, Ingersoll vs. K. G. C.; 127 U. S. 667, Travelers' Ins. Co. vs. McConkey.

Inquests are not admissible as evidence of causes of death. May on Insurance, p. 705, Note 4; Goldschmidt vs. Mutual Life Ins. Co., 7 N. E. R., 407; U. S. Life Ins. Co. vs. Kielgast, 26 Ill. App. 567; Am. Digest 1889, p. 2033, No. 406; Neblock Mutual Benefit Societies, p. 210, Sec. 175; Mut. Life Ins. Co. vs. Schmidt, Ohio, 8 Am. Law R. 629; Cook vs. Stand. Life and Acc. Ins. Co., 47 N. W. R. 568.

Plaintiff is not estopped by the statements made in "proofs of claim." She may show, and has shown, that such statements were erroneous. Home Benefit Ass'n vs. Sargent, 142 U. S. 698-9; 35 F. R. 35, Am. and Eng. Ency. Law, Vol. 13, p. 657; Note 4, "Statement of Physician;" 94 U. S. 495; 26 Ill. App. 567; 47 F. R. 272, Am. Digest 1889, p. 2033, No. 406.

Dinkelspiel & Hart Attorneys for Defendant and Appellee:

Where, under a policy of insurance, which is a conditional contract of indemnity, proofs of loss must set up specifically and categorically the date, circumstances, and cause of death, etc., and proofs of loss are made in conformity with said contract, no suit will be allowed to be instituted, much less legally prosecuted, by attempting to show facts at the time the case is tried, and for the first time, which are substantially at variance with the proofs of loss furnished to the insurer. Cook on Life Insurance and authorities there cited; Mrs. Campbell vs. Charter Oak Fire and Marine Insurance Company, 10 Allen, pp. 112, 113 *et seq.*

A policy of insurance with a clause in the contract to the effect that if the assured die by his own hand, sane or insane, and in case of death by suicide the company agrees to pay the net reserve of the amount due on said policy is reasonable and legal; the courts will maintain said contracts. Bigelow vs. Berkshire Life Ins. Co., 93 U. S. 284; Pierce vs. Travelers Life Ins. Co., 34

Leman vs. Life Insurance Co.

Wis. 389; Gogorzo vs. Knicker ocker Life Ins. Co., 65 N. Y. 237; Chapman vs. Republic lLife Ins. Co., 6 Bissell, 238; Mrs. Anna Bois vs. Mass. Life Ins. Co., Court of Appeals for the Parish of Orleans, Opinion No. 284.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues on a policy of insurance issued by the defendant on the life of her husband. The defence is, the husband committed suicide, and the policy excludes liability in cases of self-destruction, sane or insane. The jury found for the defendant and plaintiff appeals from the judgment on the verdict.

The proofs of loss furnished the company, i. e., statements of the undertaker, physician, agent and friend, as well as the coroner's inquest, stated suicide as the cause of death. The defendant offering these proofs insisted plaintiff was bound by them, that is, defendant objected to any testimony contradicting these proofs. The court admitted the testimony. It is to be observed at the outset, the cause of death in this case is purely a matter of opinion. There is no testimony whatever on the subject, except the fact the insured was found dead from a mortal gunshot wound, with a pistol wedged in the bend of his thumb, and the body so disposed, as will be discussed in another place, as to suggest inferences entirely consistent with accidental death or at least not of a character to exclude every supposit on but suicide. If opinions of witnesses as to the cause of death are to be accepted as conclusive, contained in statements which the company exacts under their policy, it is a harsh application of the supposed rule as to the effect of such statements. In our opinion, neither reason nor authority support the contention of the company in this respect. We think the proofs of death were admissible to be weighed by the jury with other testimony administered. Such was the ruling of the lower court and we sustain it. See Home Association vs. Sargent, 142 U. S. 699; Company vs. Newton, 22 Wall, p. 36; 26 An. 404. The authorities, perhaps, do not go the full length here affirmed, but they tend to give the proofs of death admissibility, but certainly do not assert their conclusiveness. The better opinion is the insurer is not estopped by the proof. Bliss Life Insurance, Sec. 265.

The discussion on the point that suicide should be regarded as

HARVARD LAW LIBRARY

Leman vs. Life Insurance Co.

proceeding from insanity, and not bar recovery, even though the policy stipulated no recovery in cases of self-destruction, has been ended, as life policies now usually, we believe, contain what is known as the "sane or insane" clause, i. e., no recovery in cases of suicide, sane or insane. That clause is in this policy.

But still, notwithstanding the sane or insane clause, to defeat a recovery on this policy it must appear the deceased took his life. In this case the testimony, mainly the mute witness of the dead body, is all on which the company relies, besides the statement in the proof of loss from those who were possessed of no knowledge, save that afforded by the body of the deceased. There is in the record a mass of what is termed expert testimony. It of course consists of theories as to the cause of the death. The testimony is of those who testify from their experience in the use of firearms and from physicians who draw their inferences from the gunshot wound, the position of the body and other circumstances. The admissibility of such testimony is at best doubtful. Bliss on Life Insurance, Secs. 378, 379. The court at last must determine the basis and potency of all such theories arising from all the facts. These facts are: The body found with the wound from a gunshot causing death, the discharged pistol wedged, or as if it had been forced on the thumb of the right hand, the body reclining on the sofa as of one sleeping, the left arm rested on the breast, the right leg crossed on the left, the head in the usual position of one in repose, and there being no evidence of any convulsive movement, if we correctly translate the technical word "jactitation," used by the physicians who testify. The pistol was "tightly wedged" to the thumb so as to require force to remove it. The question is whether these appearances point to suicide, to the exclusion of any other cause? Why not, with equal potency, to accidental death or death by the hand of another?

Dr. Gray, who was one of those who gave a statement at first attributing the death to suicide, seems to have changed his opinion. He testifies:

"I was first led to believe it was suicide from the fact that the body was dead and the pistol was on his hand, but the fact as stated in a previous answer (viz.: that thumb was thrust through guard of pistol and tightly wedged as if it had been thrust in forcibly) the force necessary to draw the thumb from the guard, the absence of any evidence of *jactitation*, or of having been any, as shown by the

Leman vs. Life Insurance Co.

precise manner in which the body laid, with arms folded, the legs crossed at ankles as in a person sleeping, have raised doubts in my mind as to how his death did occur, whether by his own hand, or by that of another." The testimony of others professing to be experts as to the handling of firearms and the causes of this death reaches a conclusion different from that of Dr. Gray. We think, giving all due effect to the expert testimony, it is at least fair to say it does not establish the suicide.

In any consideration of the cause of the death weight is due to the condition of the deceased in life, *i. e.*, his domestic relations, his means, his health and the state of his mind. It is human experience that the motive prompting self-destruction is to be sought, and usually found, in domestic unhappiness, ill health, financial troubles or insanity. In this case no such causes are exhibited by the record. The deceased was fortunate in business, had a wife and children to whom he was attached, and with whom he was happy. He parted with them on the day of his death in the best of spirits, and the shock of his death came a few hours later. No physical malady or mental disturbance or financial trouble existed to furnish any cause for taking his life.

In this condition of the record there is no adequate basis to refer the death to the intentional act of the deceased. If there are indications that point to suicide, there are other features not consistent with that theory. When, as in this case, circumstantial evidence alone is relied on to establish suicide, it is at least within bounds to say the evidence must be of a character to exclude with reasonable certainty any other cause of death. If the evidence falls short of this exaction the suicide is not proved. The fact of death remains, and that casts the liability on the company insuring against death; with the excepted case of self-destruction which the company fails to establish. This appreciation of the evidence and of the burden of proof constrains us to set aside the verdict and judgment of the lower court in favor of the defendant. *Bliss on Life Insurance*, Secs. 366, 367; 47 N. Y. 52; 26 An. 404.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed and that plaintiff do have and recover from defendant five thousand dollars with legal interest, and that appellees pay costs.

Rehearing refused.

HARVARD LAW LIBRARY

State vs. Leftwich.

No. 11,543.

THE STATE OF LOUISIANA VS. RANDALL LEFTWICH ALIAS RANDALL BUTLER.

If the motion to quash an indictment for alleged defects in drawing the jury, may in certain cases, be made after the first day of the term, such motion will be deemed too late made several days after the indictment is found and ten days after the beginning of the term, especially when the accused is in custody awaiting indictment when the term begins, and all the facts on which the motion is based are then known to his counsel. Act No. 44 of 1877, Secs. 10, 11; 5 An. 342; 31 An. 94, 369; 37 An. 216.

The statement of the judge in the bill of exceptions, that he ordered of his own motion the plea of not guilty to be entered for the accused, will be deemed conclusive in this court, and the verdict will not be set aside and a new trial ordered because the judge ordered the minutes corrected so as to show the entering of the plea and refused to hear testimony contradicting his statement of the performance of an official act and the corrected minutes. 32 An. 1227; 34 An. 881; 39 An. 1105.

Nor will the verdict be set aside and a new trial ordered because the lower court overruled questions to the jurors on their *voir dire* whether or not they would follow the instructions of the court in the contingency of circumstantial testimony, the question supposed might be presented, it appearing by the bill the court gave the jury an accurate charge as to nature and degree of circumstantial testimony required to convict.

After trial and verdict in a criminal case—i. e., a murder, there must be conditions highly exceptional to authorize the appointment of experts to examine and report whether stains on the dress of the deceased produced before or referred to in the testimony given to the jury were blood stains, the report to be used on the new trial sought to be obtained. No such conditions exist in this case, nor will the new trial be granted on the ground of newly discovered testimony which, if attainable, with due diligence could have been obtained on the trial.

A PPEAL from the Twentieth Judicial District Court, Parish of Assumption. *Guion, J.*

M. J. Cunningham, Attorney General, and *Oscar D. Billon*, District Attorney, for the State.

Pugh, Marks & Pugh Attorneys for Defendant and Appellant.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the sentence of death for murder. The record brings up ten bills of exception.

There was a motion to quash the indictment based on a challenge to the array of jurors for alleged irregularities in the drawing. It is

46	1194
48	1457
46	1194
50	404
46	1194
52	210
46	1194
120	750

claimed that one of three who acted as jury commissioner had vacated his office by accepting the position of deputy sheriff, that persons other than the commissioners suggested names and participated in the drawing, and that all the names of the jury drawn for the term were not in the box when the grand jury was selected by whom the indictment was found. Our examination has not impressed us with the force of these grounds, but it is enough in our view to dispose of the motion to quash, that the law requires that it should have been made earlier. The defendant was in custody on the charge of murder when and before the term of court begun; the counsel who made the motion had been employed on the preliminary examination and all the facts relied on to sustain the motion to quash were known to counsel before the indictment found on the 22d March, 1891; the term commencing on the 19th; the defendant arraigned on the 22d and the motion to quash not filed until the 30th of the month. The requirement of the law, that motion to quash for supposed defects in drawing the juries, shall be made on the first day of the term, is to secure the prompt administration of justice and with that view to prevent the holding back of motions of this character preventing alleged irregularities easily corrected without serious delay or expense, if made at the beginning of the term. If the statute should be relaxed when the indictment is found after the term, as was the case here, although the accused was in custody and represented by counsel, cognizant of all the facts on which the motion to quash the venire was based, still the motion should not have been delayed until the 30th March, ten days after the term began and the day fixed for the trial. In any view we hold that to be too late. We are fortified in this view too by the absence of any fraud practised on the accused or wrong that could arise from the alleged defect in drawing the jury. Act No. 44 of 1877, Secs. 10 and 11; 31 An. 369, 94; 5 An. 342.

Another bill, the second, is to the refusal of the court to permit the propounding to jurors on their *voir dire* the question as to whether they would follow the instructions in the contingency of a charge as to circumstantial evidence. Hypothetical questions how the jury would or would not be influenced in certain supposed conditions of the testimony are calculated to mislead and confuse jurors, and to ask the juror whether he would respect the instructions of the court is certainly out of the usual course. In this case while the

State vs. Leftwich.

court declined to permit the question in the form counsel penned it, the charge as to the nature and force of circumstantial evidence was given with entire accuracy and great liberality to the defendant. We think the question proposed was properly overruled.

Another bill (the fifth) denies the right of the State to close the argument when the defendant, as in this case, offered no testimony. There is nothing in this exception. 15 An. 557; 31 An. 91.

It was part of the case of the State to offer testimony that a dress found in a bureau removed from the house of the deceased belonged to her, and that there were blood stains on the dress. The defendant objected to the testimony of the physicians tending to show the blood stains. It is claimed that the search, soon after the crime was committed, developed no such dress, or at least none that was stained; that the mother of the deceased produced the dress some time after the killing, and, exasperated as she was against the accused, the statement of the mother that she had found the stained dress in the bureau was not entitled to credit. All that is urged by the defence in this respect might well tend to depreciate the weight of the testimony as to the dress and the character of the stains, but the testimony was certainly admissible; and this disposes of the third and fourth exceptions, if, indeed, the last, referring to the introduction of the dress, is pressed.

The sixth and eighth bills may be considered together. One, made after trial and verdict, is to the refusal of the judge to appoint experts to examine and report as to the stains on the dress, whether or not caused by blood. The application was supported by affidavits of a number of witnesses to the effect, generally, that in the search for evidence of the crime at the house of the deceased soon after the killing no such dress, or at least none that was stained, was found, and in other respects the affidavits tended to discredit the dress theory and the testimony of the mother of the deceased, a witness on the trial. The rule for the new trial assigned as some of the grounds that the search developing no such dress, the defence was surprised by the testimony in this respect, and that newly discovered evidence would show that when the body of the deceased was found the dress was not in her house, and would in other respects present the case in a more favorable light for the accused. We have weighed with care these bills and the able argument of defendant's counsel in support of the applications. We think the proposition

to give a new trial, or practically the same thing, to appoint the experts after the trial, is inadmissible. The time to appoint experts, if deemed necessary, was while the trial was in progress, and that was the time for offering the testimony suggested in the rule for new trial. The materiality of that testimony should, we think, have suggested itself when the State's testimony on this branch of the case was being given to the jury. The testimony claimed to be newly discovered, tended to repel that of the State as to the dress and the criminating stains. The witnesses suggested in the rule for new trial were at hand, some of them in court, had testified, but not in regard to dress or stains, because not asked, and as to those witnesses not present, the court would doubtless have compelled their attendance. Under these circumstances, we can not, on the ground of surprise or due diligence or any other ground, sanction the opening of the case. The showing for the new trial is not, in our view, sufficient, and there is no ground, after trial and verdict, to appoint experts for obtaining and reporting information with a view to another trial. We think there is no merit in the sixth and eighth exceptions.

From an early period the law has provided that standing mute shall be no bar to the trial of the accused. In such case the court is directed to enter the plea of not guilty (Revised Statutes, Sec. 996). In this case the plea was made by counsel for the accused, but was entered of course under the direction of the court. It is not easy to appreciate that the plea entered necessarily under the eye and sanction of the court is vitiated because made through counsel. If the prisoner does not plead, the court is to order the plea to be entered. He does not plead in this case, and therefore the court in effect directs the plea to be entered. *Utile per inutile non vitiatur* would seem to apply to the circumstance that the counsel pleads, when if the counsel had not spoken at all the court would have caused the plea to be entered. Besides, in the argument on the rule for trial the bill recites the judge stated he had ordered the plea to be entered of his own motion, and he then, *i. e.* on this argument, directed the minutes amended so as to state the facts. The minutes were amended accordingly, and to this the defendant took a bill of exception, as well as to the refusal of the court to bear testimony that the minutes were correct as they stand, *i. e.* stating the plea by counsel of the accused. The right of the court to order an amendment of the minutes so as to conform to the facts and show this performance of

Reddick vs. White.

an official duty we think is beyond question. 32 An. 1227; 39 An. 1105; 34 An. 881. If defendant had been permitted to offer the testimony suggested in the bill tending to show the judge had not directed the plea to be entered, this negative testimony would have encountered the corrected minutes and the direct and positive statement of the judge contained in the bill, that he did direct the entry of the plea, and that his recollection was clear and positive on the point, distinctly announced when the testimony on the point was proposed to be offered. We think the statement of the judge of a fact within his own knowledge pertaining to his official duty must be deemed conclusive and accepted as such by this court. In this view the proffered testimony was useless and properly excluded. This disposes of the seventh exception.

As to the ninth exception to the exclusion of testimony that a juror had been approached by the mother of the deceased and urged to find a verdict for the State, we concur with the judge that if offered to impeach his verdict it was inadmissible, and if for any other purpose it was irrelevant.

The tenth exception was to the overruling of the motion in arrest based on word "prerent" in the indictment instead of present. It is obvious this is a mere clerical error and did not vitiate the indictment. 38 An. 66; 35 An. 293.

Our consideration has embraced all the points in the numerous bills of exception, and the views expressed in this opinion we think embody all that need be said.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

No. 11,382.

W. S. REDDICK vs. R. M. WHITE.

ON MOTION TO DISMISS.

There is no provision in our law permitting the filing of the record of appeal "*in forma pauperis*." The record must be stamped or the cause can not be heard. Constitution of 1879, Art. 145; Act No. 136 of 1889, Sec. 1, pars. 441, 10, 22.

ON THE MERITS.

The administration by the husband of the paraphernal property of the wife is not displaced and the community deprived of the fruits merely because the husband receives a salary from the partnership of which his wife is a member.

46 1198
47 348
46 1198
108 274
46 1198
116 801

Reddick vs. White.

formed for the cultivation of the plantation, a part of which is her paraphernal property; the husband having the management of the entire plantation for the partnership as well as for his wife Civil Code, Arts. 2383, 2385, 2386; 18 La. 431; 6 R. 41; 12 R. 524.

An action by the husband for alleged advances to and debts paid for such partnership, brought against the partner of his wife, is subject to the rule that one partner can not sue his copartner for specific sums, but only for a settlement of the partnership and for the balance with interest thereon found due on settlement. Story on Partnership, Secs. 217, 219, 221; 4 Rob. 445; 10 Martin, 433.

An action to recover the amount of alleged debts paid and advanced for another, is an action for the settlement of a partnership and is prescribed by ten, not by one, three or five years. Civil Code, Arts. 3358, 3554; Act of 1884, No. 76; 12 Rob. 148.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

ON MOTION TO DISMISS.

F. C. Zacharie against the motion.

The judgment allowing this proceeding *in forma pauperis* was rendered contradictorily with the defendant in the District Court, and he having neither appealed nor excepted thereto can not urge objections thereto by a motion to dismiss the appeal.

The granting of an application to proceed *in forma pauperis* lies with the District Judge. 33 An. 423.

Applications to so proceed can be made and granted at any stage of the proceedings in the lower court. Eng. and Am. Ency. of Law, Vol. 8, p. 548; *Ibid.*, Vol. 4, pp. 325, 319.

The right is guaranteed under Magna Charta XLVII and XLVI and under Louisiana Constitution, 1879, Art. 11.

Ubi jus, ibi remedium, lex semper dabit remedium. Brown's Legal Maxims, 8th Ed., p. 191; 2 Ld. Raymond, 953, are maxims of the civil law.

Although the right to proceed *in forma pauperis* in common law must be given by express statute, yet in chancery it is afforded on principles of abstract equity. Eng. and Am. Ency., Vol. 8, pp. 544, 545, and authorities in note.

The courts of Louisiana are courts of equity as well as of law, and will give relief wherever a chancellor in equity can and will give. Hennen's Digest, Vol. 1, pp. 479 and 480, tit. Equity; 7 An. 498; 11 An. 572; 15 An. 409, 506; 2 Howard (U. S.), 318; 2 Cranch, 191; 4 R. 83.

Reddick vs. White.

Our statute in prohibiting the filing of unstamped documents is not any more prohibitory than the English law on the same subject, and yet under that law, in admiralty and equity, unstamped documents are allowed. Pritchard's Admiralty Dig., Vol. 1, 442, tit. Stamps, Secs. 229, 230, 231, 232, 378.

ON THE MERITS.

Same Counsel for Plaintiff and Appellant:

Prescription *liberandi causa* is to be construed *stricti juris*.

The prescription under Art. 3358, R. C. C., and the amendatory Act of 1888, does not apply to the debts of one co-obligor paid by his joint obligor. 12 R. 149; 2 An. 636, 780; 10 An. 395; 19 An. 493; 24 An. 200; 28 An. 181; Bishop on Statutory Crimes, pp. 227 and 246; Bacon's Rule; 8 Smith (Penn.), 448; Dwar. Stat., 2d Ed. 621; Smith's Const. Stat. 172; 7 Carr and P. 444; 6 Ib. 369, 726, 446; 11 Ir. 477; 10 Vt. 587; 9 Carr and P. 486; 44 Mich. 617; 38 Iowa, 321; 84 N. Y. 565; 71 N. Y. 481; 29 Mich. 50; 1 East P. C. 187, 188; 18 Ala. 415; 2 Ev. D. 268; 7 B. and C. 596; 23 Law Times Rep. 156; 28 L. and Eq.; 5 Bing. N. C. 185.

The prescriptions of one and five years do not apply to the same, but only the ten years prescription for personal actions. Same Louisiana authorities as above.

A judgment, to have the authority of *res adjudicata* and the effect of estoppel, must be for the same cause of action, for the same thing, between the same persons, on the same quality. Bouvier's Dict., *verbo Res judicata*. "A judgment for or against two or more joint parties ordinarily determines nothing as to their respective rights and liabilities as against each other in their own subsequent controversy." Black on Judgments, Vol. 2, Sec. 599; 73 Mo. 145; 39 Am. Rep. 489; 35 Ala. 312; 73 Am. Dec. 491; 34 Kan. 122; 8 Pac. Rep. 253; 28 N. J. Eq. 71; 18 Ohio St. 412; 26 Ind. 378; Eng. and Am. Law Ency., Vol. 21, p. 152; 46 Hun. N. Y.; 1 Ga. 200; 44 Am. Dec. 638; 95 N. Y. 212; 37 Minn. 49.

In sales of land which contain no stipulation for interest, the purchaser is liable for interest from the day he takes possession, especially if he receives rents and profits. Eng. and Am. Ency. of Law, Vol. 2, p. 395. All debts in Louisiana bear interest at

Reddick vs. White.

the rate of five per cent. from the time they become due. R. S., Sec. 1183.

"Whenever money has been received by a party which *ex æquo et bono* he ought to refund, interest follows as a matter of course."

95 U. S. 644; C. C. 1932, 2984; 19 L. 431; 8 R. 13; 1 An. 265; 3 An. 338; 13 An. 353.

The interest of the husband administering the paraphernal property of his wife, as head of the community, is that of a usufructuary. 10 R. 47; 6 An. 636; Duranton, Vol. 14, p. 106; Delvincourt and Proudhon, cited by Toullier, Vol. 12, p. 133; R. C. C. 540; Proudhon, *Traité des Droits d'Usufruits*, tom. I, Ed. 1836, p. 340, Sec. 279, p. 342; *Ib.*, tom. III, p. 574, Secs. 1767, 1768.

And as such on paying debts of a co-obligor is subrogated to all the rights of the co-obligor's creditor. Proudhon, *Traité des Droit d'Usufruit*, tom. IV, p. 89, Sec. 1407, Ed. 1836; Demolombe, *Traité des Contrats*, tom. IV, pp. 517, 518, 568; Mourlon. p. 454; Gauthier, 356; Larombière, tom. III, Art. 1251; No. 44, Sec. 570; 2 R. 424; 5 An. 500; 9 An. 247; R. C. C., Art. 2161, Sec. 3; 14 An. 663; Hennen's Dig., Payment, II, Vol. 2, p. 1164; 15 An. 705.

The husband, in the absence of proof to the contrary, is presumed to administer the paraphernal property of his wife. R. C. C., Art. 2385; 14 An. 282; 18 An. 105; 6 R. 41; 18 An. 189; 20 An. 208; 21 An. 345; 33 An. 160; Merlin, *Rèpert. de la Jur.*, tom. 22, p. 275, par. 3.

When accounts are complicated and need intricate calculations, the Supreme Court will remand the case to have them adjusted and audited in the lower court. 5 An. 192; 31 An. 532; 34 An. 1218; 36 An. 351.

The two spouses and the community constitute three separate entities, or *êtres moraux*, having each their separate, distinct relations to each other. 6 An. 636.

A debt owed by one person to another does not become a partnership debt, by the creditor and debtor afterward forming a partnership, and the creditor may sue the debtor therefor before the settlement of the partnership. 2 An. 218; 6 An. 682.

The cases cited in 4 R. 440; 10 M. 433, and Story on Partnership, are cases of partnership debts paid by individual partners, and the doctrine therein does not apply here.

Reddick v. White.

In cases where the debt is an individual and not a partnership debt, the partner paying the debt of the other may recover before a settlement of the partnership. Eng. and Am. Ency. of Law, Vol. 17, pp. 1257, 1258, 1259 and cases there cited, particularly 6 Ala. 129; 4 Ala. 225; 38 Ill. 533; 10 Allen, 429; 10 Iowa, 224; 15 Johns. (N. Y.) 160; 62 Mich. 133.

E. Howard McCaleb Attorney for Defendant and Appellee:

Where the fruits and revenues of a wife's paraphernal property were put into a copartnership, of which she was a member, with the authorization of her husband, and where the husband was an employé of such partnership, he can not subsequently claim that these fruits and revenues were under his dominion and control, as head and master of the community. 14 An. 68; 26 An. 640; 14 An. 211; 42 An. 785.

Where the husband acts as agent of a partnership, of which his wife is a member, he can not be considered as administering her property put into such partnership, in his capacity as head and master of the community, and, as such, entitled to the fruits and revenues. A husband may act as his wife's agent, in the administration of her paraphernalia, with or without a written power of attorney, and without depriving her of her administration. 33 An. 160; 2 An. 890; 17 La. 421.

The property of a succession, when received by the wife, is paraphernal, which she may administer without the consent of her husband, and in the administration of which she needs not his authorization.

Plaintiff's claim, if any he ever had, which is denied, is prescribed (1) by ten years (R. C. C. 3544); (2) by five years (3540). ("A silence of five years in the settlement of partnership accounts will bar any claim for a balance.") (17 An. 28)—and (3) by three years. Act No. 78 of 1888.

"An agent's right of action upon an account for moneys advanced is barred by the lapse of three years. 16 An. 224.

A partner can not sue his copartner for specific sums, but only for a settlement of the partnership and for the balance found due on such settlement. Story on Partnership, Secs. 217, 219 *et seq.*; 4 Rob. 445; 10 M. 433; H. D. "Partnership," IV. (b), Nos. 1

Reddick vs. White.

and 2, p. 1093. "A suit for a specific sum can not be considered a suit for a settlement, even where there is a prayer for general relief." Mead vs. Curry, 8 N. S. 281.

The prayer of the petition determines the character of the action. 16 La. 44; 1 Rob. 109; 5 Rob. 132; 10 An. 657; 15 An. 293; 20 An. 170. It appearing from the prayer of the petition in this case that plaintiff sues defendant for a specific sum, and not for the settlement of the partnership of Reddick & White, defendant's exceptions, filed *in limine litis*, should have been sustained and this suit dismissed, reserving to either partner the right to sue for a final settlement.

The husband alone can not sue for the settlement of a partnership of which his wife was a member. C. P. 107; 2 La. 57; 17 An. 204. Every partner has the inherent right to sue his or her copartner for a partnership settlement. Where a married woman was, with the consent of her husband, a member of a copartnership, she has the right to sue her copartner for a settlement with her husband's authorization, or, in case of his refusal, with that of the judge. 26 An. 646.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MILLER, J. The motion to dismiss in this case is on the ground the record of appeal is not stamped as required by Sec. 1 of Act No. 136 of 1880.

The appellant claims that under the order of the lower court the appeal was allowed *in forma pauperis*, dispensing him from stamping the record. We are aware of no legislation that authorizes this court to dispense with the stamping of the record as a preliminary to the hearing of the cause. The appellant refers to the dispensation from costs accorded by courts of equity to the poor litigant and insists our courts can observe the same rule. But our courts are controlled by the legislation on this subject. That legislation is to provide the means to maintain the judiciary by stamps to be paid for by the litigant and affixed to all papers filed or used in the courts, including records of appeal. The State is exempted from costs on the general principle that in its own courts the sovereign pays no costs.

Reddick vs. White.

The city pays none in advance in criminal cases by statutory exemption, and there may be other exemptions by statute. The exemptions illustrate the rule that all litigants must observe the law requiring stamps in legal proceedings. It is claimed that the eleventh article of the Bill of Rights of the State Constitution declaring that the courts are open to all entitles the appellant *in forma pauperis* to file the record without stamps. The same Constitution provides for stamps to be paid by litigants as the revenue of the State for supporting the courts. If under Article 11 of the Bill of Rights the courts are to be open without costs to the class of litigants who claim privileges as poor litigants—on the same principle it might be claimed there was no authority under the Bill of Rights to exact any stamps. We think the right of all to appeal to the courts for the redress of grievances is subject to the limitation in the Constitution itself, that fees shall be paid in the form of stamps. We find no warrant in the Constitution or in our legislation to dispense the appellant from stamping the record, and we can not supply an exception when the law-giver has made none. Constitution, Art. 145; Act No. 136 of 1880, Sec. 1, par. 45, Sec. 10, 22.

In 33d An. 226, an application was made to this court to compel the lower court to send up the record without the stamps on the ground of the poverty of the litigant. This court, without passing on the question of exemption of the litigant from costs, referred the applicant to the lower court. The case decides nothing except the application must be made primarily to the lower court. In this case that application was made and the issue now is presented to this court, whether it can entertain this appeal on an unstamped record. In our opinion we can not, but in view of appellant's application to the lower court, and by reason of its order, we think the appellant should be allowed an opportunity to stamp the record if he desires to submit his case for decision.

It is therefore ordered, adjudged and decreed that the appeal be dismissed at the appellant's cost, unless within ten days he place the requisite stamps on the record of appeal.

ON THE MERITS.

MILLER, J. The plaintiff alleging that his wife, inheriting a plantation, sold a portion to defendant and formed a partnership with him for the cultivation of the property; that in defendant's purchase

Reddick vs. White.

he assumed as part of the price one-half of certain debts of the wife, agreeing in the partnership articles that the profits of the plantation should be applied to pay these debts, and as to any residue left unpaid the defendant should be bound for his part. The plaintiff alleges that he administered his wife's share of the partnership property, made payments out of the profits of the debts stipulated to be paid, and also advanced his own funds for those payments, as well as for other partnership debts; that defendant's share of the profits was insufficient to pay the half of the debts he had assumed and his part of the partnership debts, and that he is indebted to the extent of plaintiff's payment of that part of the debts for which defendant was liable. The suit is to recover that indebtedness. The defendant pleaded the prescription of one, three and five years; the exceptions were answered, denying that plaintiff administered his wife's share of the partnership property; hence had no claims for payments made with her funds, *i. e.* arising from her share of the partnership property, or that plaintiff ever advanced his own funds for the partnership. The plaintiff's wife intervened, joining the defendant in controverting the asserted liability of defendant. The judgment was for him and plaintiff appeals.

When the partnership was formed in 1878 the plaintiff's wife was largely indebted, for part of which indebtedness the plantation was mortgaged. The defendant in purchasing part of the plantation agreed to pay as part of the price one-half of the wife's indebtedness, the half being fixed at four thousand nine hundred and eight dollars. The partnership agreement proposed that all the revenues derived from the cultivation of the property should be applied to pay the wife's indebtedness subsisting at the date the partnership was formed; that the defendant was to be bound for one-half of any amount left unpaid, and there were the usual stipulations for the equal division of partnership profits and debts. The plaintiff managed the property, attended to the cultivation, shipment of the crops, and received and applied the proceeds. The crops appear to have been meagre. The funds realized from their sale seem to have been applied in payment on the mortgage debt and expenses of the plantation, and at the close of the partnership in 1883 a large portion of the debts expected to be discharged from the crops remained unpaid. We have been unable to determine from the record the contention of plaintiff that he paid the debts of the partnership to the extent of

Reddick vs. White.

becoming a creditor of the defendant for four thousand four hundred and thirty dollars, the amount for which judgment is claimed. The petition refers to the account annexed. We find an account of crops and payments, another headed Black's notes, and a mass of testimony referring to disbursements for the partnership. From all these we can not ascertain how the plaintiff makes up the amount he claims nor how it is supported. The record furnishes no basis on which the pecuniary relations of the parties can be adjusted, and hence determining the legal questions, we will remand the case.

The law presumes the paraphernal property of the wife to be under the husband's administration, and when thus administered the fruits belong to him. Civil Code, Arts. 2383, 2385, 2386.

The defendant denies that the husband so administered, and in this the wife, in her intervention, concurs with defendant. To support their contentions both rely on the fact that the plaintiff was paid for his services in managing the plantation, and it is claimed he was a mere laborer for the partnership. We think the argument of defendant on this point misconceives the fact as well as the legal relations arising out of the fact. The partnership agreement stipulated three hundred dollars per annum should be allowed for labor; that is, all the labor required. It was this three hundred dollars plaintiff was paid, or rather reserved for himself out of the partnership revenues and with which he defrayed all labor charges. The fact that he received this three hundred dollars per annum from the partnership, in which his wife was a partner, did not exclude him from administering the paraphernal interest of one-half in the partnership, or deprive him of the right *jure maritia* arising out of that administration. The defendant's brief suggests the plaintiff was a laborer on the plantation before his wife acquired it, and that relation the defendant insists was not changed after the wife acquired, sold one-half the plantation to the defendant and formed the partnership. We think, on the contrary, when the wife acquired the property, and at a later period formed the partnership for its cultivation, the property first, and afterward the partnership interest in respect to it, fell by operation of law under the husband's administration. The wife may retain the administration of the paraphernalia by appointing the husband her agent. Civil Code, Art. 2384. In this case, no such agency existed. The husband administered solely by virtue of the marital relations. The wife sued

to resume the administration of her paraphernal estate, but not till 1888. It is our conclusion, therefore, the plaintiff became entitled to the share of his wife in the partnership revenues, and in the adjustment of defendant's liability, if any, plaintiff is entitled to charge all payments of partnership debts made with, or from the wife's share of the partnership funds. If over and above the funds derived from the partnership the husband made payments of the partnership debts during its existence or after its dissolution, he is entitled to recover one-half the amount so paid, with legal interest from the dates of such payments. If these payments should have been on account of the mortgage debt of the wife, that would not entitle the husband to any subrogation to the rights of the mortgage creditor, as there was no conventional or legal subrogation. The husband is not bound for the debt of the wife resting on her separate property, i. e. acquired by inheritance, as in this case, and hence if he paid her mortgage debt or that of the defendant, her partner, there would be no subrogation.

The plaintiff in this case is asserting, in respect to the paraphernal interest of the wife in the partnership, the right of one partner against his copartner. The same rule applies as in ordinary cases for the settlement of the partnership. It is well settled one partner can not sue the other for specific sums. The suit must be for the settlement of the partnership, which of course embraces an inquiry into the assets of the partnership; its liabilities, the profits, the credits in favor of each partner, and the charges against him. On all these elements the balance for or against the partner is ascertained, and judgment given accordingly. Story on Partnership, Secs. 217, 219 *et seq.*; Gridley vs. Connor, 4 Rob. 445; 10 Martin, 433, *passim*.

It is only for the balance found due on the final settlement that the partner can sue. If either partner has paid mortgage debts which the partnership assumed, or if the share of the profits of either partner has been thus applied, there would be no subrogation in favor of either partner to the mortgage debts. The whole right of the partners are merged in the balance found due on the settlement.

The prescription of three years pleaded by defendant has no application to the demand of plaintiff. That prescription refers to accounts for goods sold, and merchants' accounts against their principals, and generally to those business or other relations in which

Reddick vs. White.

accounts are usually rendered. Civil Code, Art. 3538; Act of 1888, No. 7.

The prescription against the actions for moneys advanced or debts paid by one for another, or for the settlement of partnership, is ten, not three or five years. C. C., Art. 3544; 12 Rob. 148.

Reserving our opinion on the question of liability we will remand the case with instructions for the lower court by testimony or the report of experts to ascertain.

1. The amount of the payments, if any, by the plaintiff out of his own funds, *i. e.* not the funds of the partnership, of the debts of the partnership.

2. The amount of the debt of the partnership, if any, paid by defendant out of the funds of the partnership.

3. The amount of the partnership funds received by each partner.

4. The balance for or against each partner on the adjustment of the partnership affairs.

We assume that as to the amount of the crop proceeds and the mortgage debt of Bowland the record as it now stands affords full information, and it is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed; that the case be remanded as directed and for the purposes stated in this opinion, and that appellee pay costs.

ON APPLICATION BY PLAINTIFF FOR REHEARING.

As the record does not furnish the basis to adjust the controversy we will so far modify our previous opinions as to reserve for determination, when the case comes again before us, the questions of interest claimed by plaintiff and whether he is entitled to any subrogation to the mortgage rights of Bowland or the judgment rights of Black and Davis. In making this reservation we are not to be understood as acquiescing in the views of plaintiff's counsel advanced in support of the application for rehearing. We simply reserve the questions.

It is therefore ordered, adjudged and decreed that the former opinion and decree be modified to the extent stated and the cause be remanded for the purposes stated in the original opinion and decree, and although we think all the testimony needed has been indicated, with the right of the parties to offer, besides, such testimony as they deem pertinent.

Rehearing refused.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT MONROE,
IN
JUNE, 1894.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. LYNN B. WATKINS, HON. SAMUEL D. MCENERY, HON. JOSEPH A. BREAUX, *HON. HENRY C. MILLER.	}	<i>Associate Justices.</i>
--	---	----------------------------

*Appointed on the 1st day of February, 1894, vice Justice Parlange, resigned.

No. 1289.

JAMES L. SPENCER VS. LEON SCOTT, SHERIFF, ET AL.

1. When a husband has legally selected and recorded a homestead, the homestead right is not destroyed by the fact, that subsequently thereto, personal property of the husband, not included by him in the declaration, is transferred by him to his wife in payment of paraphernal funds of hers received by him and converted to his own use, thus placing this property beyond the reach of his creditors. The Constitution contemplates the possibility of the co-existence of ownership of paraphernal property by the wife with a homestead right in the husband, when the value of the property of the wife is within the limits fixed by it.
2. If the wife has legal rights which she has enforced in a legal manner, her motives in exercising her rights, do not concern the creditors of her husband. If she has no legal rights, or has enforced them in an illegal manner, the remedy of the creditors is to attack the judgment which recognizes them, and the transfer made under the judgment, to have it set aside, and the property included in the transfer subjected to the payment of their claims.

46 1209
f119 684

HARVARD LAW LIBRARY

Spencer vs. Sheriff et al.

3. When the community of acquets and gains is dissolved by a judgment of separation of property, the wife, in the absence of evidence on the subject, is presumed to have renounced the community. A wife who renounces the community stands as a third person *quoad* the community.

A PPEAL from the Sixth District Court, Parish of Richland.
Ellis, J.

Gunby & Sholars for Defendant and Appellant.

Robert Whetson for Plaintiff and Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. A certain piece of land in the parish of Richland containing one hundred and twenty acres, more or less; also one horse, two mares, four mules, one wagon and one buggy, having been seized by the sheriff of that parish in execution of a writ of *fi. fa.* in the case of Mrs. Carrie P. Myers vs. James L. Spencer, the seized debtor enjoined the sale of the land, of the horse and of the wagon and demanded a release of the same with damages on the ground that they were exempt from seizure and sale under Arts. 219 and 220 of the Constitution of the State and Act No. 114 of 1880, as the said property had been set aside and recorded as a homestead. Plaintiff in execution answered the petition, denying that Spencer had any legal or just grounds for the injunction. She admitted that the sheriff seized the property, but denied that the same is exempt under the homestead laws of the State. She denied that her debtor ever complied with the conditions prescribed by law for securing the homestead exemption and averred that the declaration filed by him more than ten years before was defective, insufficient and void. She specially denied that the horse and wagon, the sale of which is enjoined, are contained in or described by said declaration.

She further averred that Spencer abandoned and forfeited all right to claim said property as a homestead by having his wife to sue him for a separation of property and obtaining a judgment dissolving the community and decreeing him to be indebted to her for a large sum, under which judgment he attempted to transfer to her all his property not covered by the homestead claims, thereby committing a

fraud on the seizing creditor and rendering it impossible for her to collect the debt due the succession of Myers by the community of which Spencer was the head and master. She specially denied plaintiff's right to claim a homestead in the land held in indivision by him with his wife after the dissolution of the community, and the legality, justice and good faith of his claim to a homestead after there had been a separation of property collusively entered into between him and his wife, for the purpose of placing a part of his property beyond the reach of his creditors. She averred that all the proceedings in the suit for separation and in an injunction taken out in the District Court for Richland by the wife against the sale of the four mules seized as being her separate property, under the act of transfer mentioned, were instigated and carried on under the direction of Spencer, and he is estopped in law and morals from asserting or claiming a homestead exemption on the community property, and denied that he is entitled to the same on any ground whatsoever. She prayed that plaintiff's demand be rejected, the injunction dissolved, and that she have judgment in reconvention against Spencer and the surety on his bond *in solido*, for twenty per cent. on the amount of the writ enjoined, as special damages, and ten per cent. thereon as general damages. The sheriff, who had been made a party, averred he had no interest in the litigation; that he was proceeding regularly with the execution of a legal writ when enjoined. He prayed that plaintiff's demand against him be rejected.

On trial the District Court rendered judgment perpetuating the injunction. The seizing creditor has, under the amendment to Art. 81 of the Constitution, brought the case before this court on appeal. Appellee has filed an answer, praying that the judgment be amended so as to allow him one hundred dollars damages for attorney's fees.

A certified copy of the declaration of homestead made by plaintiff in injunction, together with the certificate of its registry in the parish of Richland, is in the record.

It seems to conform to the requirements of the articles of the Constitution and to the provisions of Act No. 114 of 1880. Defendant in injunction declares it to be "defective, insufficient and void," but we have not been informed, either in the argument or the brief of counsel, upon what this assertion is based. The only departure from Art. 219 of the Constitution which we notice, is the placing of a mule upon the exemption list instead of a "work horse." It is not

Spencer vs. Sheriff et al.

claimed that Spencer's wife, either at the time of the declaration of the homestead or since, has had property of her own sufficient in value to deprive her husband of his right of exemption. The property which she owned at the time of the seizure seems to have consisted exclusively of four mules (among which is the one referred to in the declaration of homestead) transferred to her by her husband in payment of the judgment which she obtained against him in restitution of paraphernal funds of the wife received by him, and converted to his own use.

The Constitution contemplates the possibility of the co-existence of a right by the husband to a homestead with ownership of paraphernal property by the wife, provided the value of the paraphernal property be under two thousand dollars.

The evidence shows that at the time of the declaration of homestead Spencer owned four mules, of which three died, but that he replaced these three by others. That not long before the seizure in the present suit Mrs. Spencer instituted a suit against her husband for a separation of property, praying for a moneyed judgment against him for moneys of hers alleged to have been received by him, and converted to his own use. That she obtained judgment in conformity to her prayer, and that in satisfaction of this judgment the four mules owned by her husband were transferred to her, and are now used in the cultivation of the farm. It is claimed that all the proceedings in the suit for separation were collusively carried on for the purpose of placing a part of his property beyond the reach of his creditors and of committing a fraud on defendant in injunction by putting it out of her power to collect the debt due the succession of Myers by the community of which James L. Spencer was the head, and that they were instigated and carried on under the direction and control of the husband. The reality of the claims of the wife against the husband is not disputed. No attack upon the judgment is made.

The wife is not a party to this suit. The contention as made is that she could not and should not legally, in good morals and equitably, enforce her judgment in view of the exemptions claimed by the husband, and the existence of debts due by him to other parties.

The main reliance of appellant for reversal of the judgment is in successfully holding, that the dissolution of the community between Spencer and wife (brought about by the judgment of separation)

had as its effect to destroy the right of exemption asserted in the declaration. The theory upon which this result is based is that the dissolution of the community operated *ipso facto* a change from ownership of the property in its entirety by the community to joint ownership by each of the two spouses of an undivided one-half interest therein. That by reason of the ownership being no longer of the property in its entirety, and of the fact that the homestead exemption can not be made to cover undivided joint interests, the homestead in this case ceased to exist.

The seizing creditor has overlooked the fact that the acceptance or renunciation of the community of acquets and gains by the wife is a matter resting entirely upon her own will, and that where it is dissolved by reason of a separation of property both allegation and proof that she has accepted are necessary to be made to justify a court in dealing with her interests or those of the husband from that standpoint. *Herman vs. Theurer*, 11 An. 70; *Andrich vs. Lamothe*, 12 An. 76; C. C. 2420.

Under such circumstances the presumption is that she has renounced. It is not alleged nor proved that Mrs. Spencer has accepted the community. The renouncing wife stands *quoad* the community as a third person. *Lombas vs. Collet*, 20 An. 80. She is not prejudiced in her legal rights by any moral obligation which it may be supposed rests upon her to see that her husband's debts to others be paid. The wife, so far from this, in dealing with her husband in reference to her property rights, is often upheld and protected where dealings of like character between the husband and one of her creditors, under similar circumstances and conditions would be liable to be set aside as fraudulent.

Mrs. Spencer either had or had not legal rights against her husband's property. If she had and enforced them legally, her motives in exercising them play no part in this controversy.

If she had not legal rights or did not enforce them legally the remedy which the seizing creditor should have pursued was to have attack the judgment and the transfer under it as illegal, fraudulent or unreal, have it set aside and the property covered by the transfer subjected to the satisfaction of her claim. A fraudulent judgment and a fraudulent, simulated or illegal transfer could be set aside. The legal result of their having been resorted to by the spouses would not be the destruction of the homestead rights to which they were entitled

Bransford, Wife vs. Husband.

under the law and the Constitution. We see no reason for enjoining the sale of the horse which was seized in this case. It was not included in the exemption list which was recorded, and besides this there has been no attempt made to show that it was a work horse. We think the injunction as to it should have been dissolved. Each side should pay its own attorney's fees. For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby amended by dissolving the injunction which issued in this case as to the horse seized, but that otherwise it stands affirmed. Cost of appeal to be paid by appellee.

No. 1290.

MRS. IDA L. BRANSFORD, WIFE, VS. JOHN S. BRANSFORD, HUSBAND.
HATHAWAY, SOULE & HARRINGTON, INTERVENORS.

1. When the wife sues her husband for a separation of property and a dissolution of the matrimonial community, she carries the burden of proving that the disorder of his affairs is such as to endanger her separate property, *in esse*, or her future acquisitions.
2. If she claim a moneyed judgment against the husband, or the recognition of her paraphernal title to property he has transferred to her, in satisfaction, in whole or in part, of her claims against him, she must administer clear and satisfactory proof of her husband's indebtedness to sustain her action as against intervening creditors.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Potts & Hudson Attorneys for Plaintiff and Appellee:

Marriage in Louisiana is only a civil contract under which each of the contracting parties have their rights and obligations well defined by the law. R. C. C. 86; 25 An. 428; 32 An. 1140.

The wife is not only a creditor of her husband for the value of her paraphernal property, alienated by him, but is a privileged creditor. R. C. C. 2390, 3215, 3319; 34 An. 788; 45 An. 774, 877.

"The wife may during the marriage petition for a separation of property," etc., "when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims." R. C. C. 2425; 23 An. 277.

46 1214
109 365

Bransford, Wife vs. Husband.

She may also obtain a judgment of separation if there is such derangement of the husband's affairs as to render a separation necessary to preserve her future acquisitions and earnings for the use of herself and family. 10 An. 272; 2 Rob. 342; 24 An. 25; 31 An. 672; 37 An. 326.

All property owned by the wife at the time of the marriage, in absence of a marriage contract, and all the property inherited by or donated to her during the marriage, is paraphernal. C. C. 2383, 2402.

The proceeds of insurance policies taken out in favor of or transferred to the wife are also paraphernal. 23 An. 455; 26 An. 326; 27 An. 269; 29 An. 714; 33 An. 322; 42 An. 739; 46 An. 240, *Stuart vs. Sutcliffe*.

The husband can sell or transfer to the wife property sufficient to replace her paraphernal property alienated. C. C. 2446; 34 An. 995; 33 An. 536; 30 An. 745; 8 An. 485.

The creditors of the husband have no interest to contest the dissolution of the community *vel non* between Mrs. Bransford and her husband. 39 An. 385, *Burns vs. Thompson*.

The interventions themselves are conclusive proof of the disorder of the husband's affairs. 39 An. 385.

When he who alleges insolvency shows the amount of the debts, it is incumbent upon the other party to show property in an equal or greater amount. C. C. 1985.

Gunby & Sholars Attorneys for Intervenors and Appellants:

A wife can not sue for a separation of property without showing that her husband is insolvent.

Where it is manifest from all the facts that the husband and wife are acting in collusion to defeat his creditors, her demands should be rejected.

Where the wife's father's succession has never been settled, she can not sue her husband as an heir thereof for claims which the husband has settled with her brother, who is practically the administrator of the succession.

Where there is no proof that the piece of property sold by the wife was received by the husband, he is not liable on a mere presumption that he received such funds. The sale by the wife is an act of administration which implies that she received the price.

Bransford, Wife, vs. Husband.

Where a life insurance policy is assigned to one of the spouses and before the death of the insured the policy is compromised and the money received from it is used by the husband and the insured in their mercantile business, the wife can not claim that the husband owes her for such policy. It was not her paraphernal property.

The opinion of the court was delivered by

WATKINS, J. Plaintiff, a married woman, sues her husband for a dissolution of the matrimonial community, a separation of property, the recognition of her separate property, and her right of administration thereof, grounded on his insolvency and the generally disordered condition of his financial affairs, endangering her paraphernal rights and claims as well as her future acquisitions.

The property petitioner claims is specified, as well as the sources from which same were derived; and the various items of indebtedness of her husband are enumerated, and the resulting balance due is fixed at one thousand four hundred and sixty dollars, for which she demands a personal judgment.

Several of the defendant's judgment creditors intervened and resisted plaintiff's demands, denying her paraphernal ownership of the property claimed and the reality and validity of the indebtedness she prefers against her husband, charging same to be fictitious and fraudulent, and the act of restitution, by defendant to his wife, of the property claimed as a part of a scheme on the part of the defendant to defraud his creditors and put his property beyond their reach.

The defendant made default.

On these issues the case was tried, and judgment pronounced in favor of plaintiff for the sum of one thousand and sixty-six dollars, dissolving the community, decreeing her the owner of the property specified in her own paraphernal right, and giving her the separate administration and control of same, and from that judgment the intervenors have appealed.

It is evident that in this case, as well as all others of its kind, the principal question is whether the plaintiff had a valid subsisting debt or demand against her husband. If she had, the defendant was entitled to convey to her property in partial satisfaction of it, as he did, and she is entitled to judgment for the resulting balance. Otherwise

the charges of unreality and fraud are substantiated, and the judgment must be reversed and a decree pronounced in favor of intervenors.

The issues before us are identically the same as they were in the court below, with the exception that the moneyed demand of the plaintiff is restricted to one thousand and sixty-six dollars, as that is the amount for which judgment was pronounced in her favor, and she has not answered the appeal and demanded an alteration of the decree.

The following are the items of defendant's indebtedness as recited in the act of restitution and reiterated in plaintiff's petition, viz.:

1. The sum of two hundred dollars, which was paid to the defendant as the one-third of the purchase price of the plantation known as the Indian Village place, to which the plaintiff was entitled as an heir of her deceased father, John A. Covington.

2. The sum of four hundred and sixteen dollars, which was likewise paid to the defendant as the one-third of the purchase price of the plantation known as the Lowery place, to which plaintiff was entitled as heir.

3. The sum of four hundred dollars, which was likewise paid to the defendant as the one-third of the price of certain mules, stock of cattle, sheep, etc., which were disposed of and to which plaintiff was entitled as heir.

4. The sum of one thousand two hundred and fifty dollars, which was likewise paid to the defendant, as the proceeds of certain policies of life insurance which had been compromised and surrendered, to which plaintiff was entitled as assignee.

Claim is made for the first three amounts as having been derived from the sale of property of the plaintiff's father's succession, made by his legal heirs and surviving widow, and of which plaintiff was and is beneficiary to the extent of one-third, on the following theory:

That during his lifetime John A. Covington acquired sundry small pieces of improved real estate, situated in the vicinity of the place where he conducted a mercantile business which was operated in the name of John A. Covington & Son. That J. A. Covington was twice married, and of the first marriage the plaintiff and her brother, J. Y. Covington, were the sole surviving issue at his death; and of the second marriage there was no issue—his second wife surviving him.

Bransford, Wife, vs. Husband.

Of the various properties which J. A. Covington purchased, some were acquired during the second, but the greater part during the first community; consequently, the three parties in interest agreed among themselves to make a division of the effects of the deceased on the basis of one-third to each; and hence, when a piece of property was sold, one-third of the proceeds was delivered to each—the share falling to the plaintiff being delivered to her husband, the defendant.

After his father's death, J. Y. Covington, the son and partner, continued to operate the mercantile business as before, to pay its debts and wind up its affairs—there having been no formal administration of the succession—and the heirs taking unqualified control of the property and affairs of deceased as their own, as an inheritance, without objection or complaint by creditors.

The intervenors, however, insist that J. A. Covington was largely indebted at the time of his death, and, consequently, there was nothing remaining in his succession for his children to inherit, and they had no inheritance.

There is in the record no proof of J. A. Covington's indebtedness at time of his death, except the statement that J. Y. Covington made as a witness in another suit, to which the plaintiff was not a party, or a privy. And as she urges the objection that it was *res inter alios acta*, we must decline to consider the evidence, as the objection was undoubtedly good and should have been sustained by the judge *a quo*.

But if the proof be as intervenor's counsel insist it is, it could not affect the question, for the reason that by the simple and unconditional acceptance of J. A. Covington's succession by his heirs, and the appropriation and sale of its property and effects, the succession is no longer *in esse*, it becoming absorbed by the heirs. In addition, J. Y. Covington took charge of and subsequently conducted the mercantile business of J. A. Covington & Son, and liquidated its affairs and presumably settled its debts. At least it is reasonable to suppose that they have been settled, as we hear of no complaints, suits or judgments by his creditors, and the heirs have peaceably taken possession of his property, sold it, and divided its proceeds. Under these circumstances we think we are not at liberty to entertain a doubt of the reality and validity of the plaintiff's inheritance from her father.

As to question of fact, we are of opinion that there is just as little

doubt as to the *amount* plaintiff was entitled to have received on the score of the sale of the Indian Village and Lowery places; but as to the four hundred dollars she claims on the score of stock, etc., sold, we can not express our opinion, inasmuch as the District Judge rejected that item and plaintiff asked no amendment of his judgment.

In regard to the second item the proof is clear to the effect that the sum of four hundred and sixteen dollars was delivered into the possession of the defendant for the plaintiff; and there is no proof that the money was afterward returned to her. But in regard to the first item the proof is not quite clear. The party who made the purchase of the Indian Village property states that he paid five hundred dollars in cash to J. Y. Covington in two different payments, and gave his note for the balance of one hundred dollars; and that neither the plaintiff nor the defendant was present at the time. Covington rather confuses the matter in his statement by making an explanation of the two transactions at the same time; but he substantially declares that he "paid one hundred and fifty dollars of that which Bransford received." And, taking this statement in connection with that of Parker, it becomes reasonably certain that the defendant did receive this one hundred and fifty dollars, which is fifty dollars less than the sum allowed by the judgment appealed from.

The transaction with regard to the life insurance policies was substantially as follows, viz.:

J. Y. Covington being somewhat embarrassed financially obtained a loan of money upon the endorsement of two friends to the extent of about eight thousand dollars, and as collateral security he assigned to them two policies of life insurance for two thousand five hundred dollars each.

Having subsequently returned the money borrowed, the pledgees transferred the policies to the plaintiff at the request of the beneficiary, her brother.

For reasons of his own, which were not disclosed, the agent opened communication with the plaintiff as assignee with a view of compromising the risk and recalling the policies. This negotiation was attended with some difficulty and delay.

Of this the agent says:

"I then called upon Mr. Bransford, made known my business to him, and offered to pay Mrs. Bransford the amount of the premiums

Bransford, Wife vs. Husband.

paid with interest, if she would surrender the policy. The matter was submitted to her and declined. During the next six or eight months I made her, through her husband, four or five offers. Finally, I offered to pay her one thousand dollars for the remainder of the policy. Every offer (was) in turn declined (and) in the meantime one or two half-annual premiums were paid. During the last week in February, 1893, Mr. Bransford called me in his store and said that he was hard pressed for money, etc., and that if I would pay one thousand two hundred and fifty dollars for the policies, that he was of opinion he could induce his wife to sell them.

"I submitted the offer to the company (and it) was accepted.

* * * * *

"I then wrote out a receipt for Mr. Bransford to send to Mrs. Bransford to sign, and drew my check No. 15 on the Capital State Bank, at Jackson, Mississippi, payable to my own order, and left it with Mr. F. P. Stubbs to deliver to Mr. Bransford upon the delivery of the policy and receipt signed by Mrs. Bransford. In a few days the receipt was received, * * * and upon the receipt of the policies and premium receipts I handed Mr. Bransford my check No. 15 before mentioned amounting to one thousand two hundred and fifty dollars."

It thus appears that not only were the policies duly assigned by Covington's pledges to Mrs. Bransford, at his request, but the insurance company recognized her as the legal assignee of them, and, as the result of an *eight months'* negotiation with her, purchased them from her and paid her one thousand two hundred and fifty dollars for them, giving the agent's check to the defendant.

The president of the Ouachita National Bank states that he recollects the check and that same was collected through his bank for account of J. S. Bransford; and that the proceeds were placed to the credit of his account and drawn out again on his checks at different times.

The averments of intervenor's petition with reference to these insurance policies are that defendant "never owed his wife anything on account of his insurance policy. That Bransford paid the premiums on said policy, and whatever accrued thereon was the result of a contract made during the community, and belonged to the community. They further specially deny that defendant received any cash or property," etc.

The theory of intervenors is manifestly incorrect. The policies were issued in favor of J. Y. Covington and were payable to him or his assigns. Either he or his pledgees paid the premiums. After the demands of his pledgees had been satisfied and they had been reimbursed the amount of the premiums they had paid, the policies were at once assigned to Mrs. Bransford at Covington's request. He swears to this as a witness.

There is neither allegation or proof of any fraud or simulation in the transaction on the part of Covington. He was not made a party to this suit, and no attempt was made to annul the assignment of the policies to Mrs. Bransford on any ground. Covington owed the intervenors nothing, and, being an unmarried man, without nearer kindred or heirs than his sister, he had a perfect legal right to transfer the policies to her as he did. And it was near eight months, subsequently, that she sold them to the company and her husband received the money.

But our attention is attracted to the fact that the proof discloses that at the time of these transactions J. Y. Covington had a latent interest in the defendant's business—having from time to time loaned him money to be employed in his business; and consequently when Bransford collected the one thousand two hundred and fifty dollars from the insurance company and checked it out of bank for the benefit of his firm, same enured to Covington's benefit also. But that is a *non sequitur*, for if Bransford was indebted to Covington for advances of money his disbursement of the one thousand two hundred and fifty dollars among *other* creditors did not benefit Covington nor *reduce* the amount of his claim. Certain it is that no part of the one thousand two hundred and fifty dollars was paid to Covington and the proof shows that Bransford subsequently sold his entire stock of goods for about five thousand dollars in cash, and out of the proceeds of sale he paid Covington about one thousand five hundred dollars in full of his claim—assuming all of the liabilities of the mercantile business.

If there is anything in these transactions, which even tends to show fraud or simulation, or an interest in the community, it is not discoverable.

To our minds the proof of the paraphernal character of the plaintiff's claim to the insurance money is just as clear and as free from doubt as the claims which arose out of her inheritance from her father's succession.

Bransford, Wife, vs. Husband.

In *Stauffer, Macready & Co. vs. Morgan*, 39 An. 632, the identical question under consideration was examined and decided. In that case the creditors of the husband attached property standing in the name of his wife, as that of the community, and she intervened, claiming that it was her separate, paraphernal property—having been purchased with her separate means, under her administration and control.

The principal question was as to the paraphernality of the funds with which the wife's alleged acquisition was made, and the controversy chiefly turned upon the question, whether there was an actual, completed donation of a check, which the groom gave to his *fiancé*, on a New York bank, just prior to their marriage—the attaching creditors denying the effectuality of the donation, and the intervenor affirming it.

The court said: "Granting the correctness of the proposition of law (contended for by plaintiff's counsel), we are satisfied that the presentation of the check to the firm on which it was drawn, and the placing of the proceeds, under her instructions, to her credit, was an effective collection of the check and a reduction of the proceeds to her possession"—thus completing the donation by a manual delivery of the proceeds and avails of the check.

So, in this case, the donation of the insurance policies was perfected by their surrender to the company and then payment of the price to her husband *upon her receipt*.

The assignability of such a policy of insurance as that under consideration is instanced by the current and weight of authority in this State. *Succession of Hearing*, 26 An. 326; *Succession of Bofenschen*, 29 An. 711; *Putnam vs. Insurance Company*, 42 An. 739; *Pilcher vs. Insurance Company*, 33 An. 322.

And in the recent case of *Stuart vs. Sutcliffe*, 46 An. 240, all of the authorities are collated, reviewed and the doctrine reaffirmed.

From the foregoing summary of law and fact it follows that the plaintiff's title to the property is supported by a good and valid consideration and was properly recognized by the judgment appealed from; that there was a valid and subsisting indebtedness on the part of the defendant to the plaintiff in excess of the estimated value of the real estate, to the amount of one thousand and sixty-six dollars, as specified in the judgment, less the sum of fifty dollars as we have ascertained from the evidence, and by which amount it should be re-

Wieder vs. Delhi Land and Improvement Company.

duced; and that, on account of business complications and his suspension of business, and the general disorder of his affairs, the plaintiff is entitled to a separation of property, the dissolution of the matrimonial community and the control, management and administration of her separate estate and property. R. C. C. 2425.

The judgment should be amended and affirmed.

It is therefore ordered and decreed that the moneyed judgment appealed from be amended and reduced in amount by the sum of fifty dollars, and as thus amended the entire judgment be affirmed and the cost of appeal taxed against the plaintiff and appellee.

No. 1283.

EDWARD WISNER VS. THE DELHI LAND AND IMPROVEMENT COMPANY, LIMITED, ET AL.

46 1223
107 111
107 185

A stockholder having sued the corporation for the annulment and revocation of a sale of property to a director and stockholder, charging fraud and want of consideration; and the corporation having sought to justify its action by a ratification of the stockholders at a general meeting, the plaintiff will be estopped from proving that the shares of stock which were voted at the meeting were fraudulently issued without consideration, the evidence being stamped on the face of the certificates that same were certified by him as the secretary of the corporation and issued to the stockholders.

This case is not that of a witness whose testimony is objected to on the ground that he can not be heard to impeach the truthfulness of a certificate he had previously made as an officer, but that of a party who sues the corporation of which he is a shareholder for the annulment of a sale which the corporation has made, and charges, as a badge of nullity, that the shares of stock which were voted at a general meeting, approving and ratifying the sale, were fraudulently issued, when in fact the certificates signed by the plaintiff as secretary of the corporation show on their face that they were fully paid up at the date of their issuance.

A PPEAL from the Sixth District Court, Parish of Richland.
Ellis, J.

H. P. Wells for Plaintiff and Appellant.

Boatner & Lamkin for Defendants and Appellees.

The opinion of the court was delivered by

WATKINS, J. This is a revocatory action, coupled with an action of nullity—an action *sui generis* possessing features common to both

Wisner vs. Delhi Land and Improvement Company.

Or, in other words, as an individual shareholder in the defendant company—and of which corporation he was a director and secretary—Edward Wisner institutes this suit for the revocation and annulment of a certain sale, *in globo*, of all the property of the corporation to another stockholder and director of the company on the ground, *first*, that the sale was not properly authorized by the stockholders at a general meeting; *second*, that there was no necessity for the sale; and, *third*, that the sale was fraudulent, not being competitive and open, or for adequate consideration.

Preliminarily the defendant, Frederick Rohnert, tendered several peremptory exceptions, viz. :

1. That the plaintiff failed to tender to the respondent the amount expended by him as the price of the property in controversy, and which has enured to the benefit of the Delhi Land and Improvement Company.

2. That he is estopped from contesting the legality of the directors' meeting held on the 3d of April, 1893, and its action in ratification of the sale to the respondent, because the action of the board of directors was ratified and confirmed at a *stockholders'* meeting held on the 4th of April, 1893, at which plaintiff was present, and in which he participated without protest or objection, and voted on the proposition to ratify the same.

3. That he is estopped from questioning the legality of the stock, owned and voted by Hibbard Baker and Morse Rohnert at the stockholders' meeting aforesaid, on the ground that, as secretary of the corporation, he signed and issued same, and can not be permitted to question or impeach the validity of his own official action.

Reserving the benefit of his exceptions, the defendant plead a general denial, and averred that he became the purchaser of the land in controversy in due course of business, without fraud and for a fair consideration. He prays that plaintiff's demands be rejected.

The land company urge the same exceptions, and the additional one that the land was sold for the purpose of providing means for the payment of pressing debts of the company and to protect the titles to other lands that the company had previously sold to other persons, the title to which had not been perfected; that the proceeds of sale had been used for that purpose, to the knowledge of the plaintiff; and he has not tendered the amounts so paid, either to the purchaser or to the company, which tender is a prerequisite to any action to annul the said sale.

Wisner vs. Delhi Land and Improvement Company.

Reserving the benefit of said exceptions the company made answer and alleged that the sale was legal and fair in every particular; that the board of directors had ample authority under the company's charter to sell, and its action was ratified by all the stockholders, except the plaintiff—a majority thereof favoring and approving the action of the board of directors in making said sale; and that said ratification cured the defects, if any, in said sale, and supplemented the authority of the board of directors, if same was, in any respect, deficient.

Recurring to the averments of the petition, we find plaintiff's statement of his case to be "that he, together with Hibbard Baker, Morse Rohnert, Fred. Rohnert and William E. Robinson, of Detroit, Michigan, and D. G. Edwards and one Miller, of Cincinnati, Ohio, are, so far as petitioner is informed, the stockholders of the Delhi Land and Improvement Company, Limited, a corporation duly organized under the laws of the State of Louisiana, having its domicile at the town of Delhi, in the parish of Richland, with the said Hibbard Baker as its president and said Morse Rohnert as its secretary. He further represents that the objects and purposes of said corporation are to purchase, plat, sell and improve real estate, as is shown by its charter.

"He further represents that the said Baker, president, and said Morse Rohnert, secretary, did, on or about the 27th of January, 1893, without any authority from either the board of directors or stockholders of the corporation, by notarial act, pretendedly sell and transfer *all* of the real estate belonging to said corporation, improved and unimproved, to Frederick Rohnert, one of the stockholders of the corporation."

The sale thus described is the one against which this suit is directed, and of it the following complaints are made, viz.:

"First. That whereas the sale was made for the ostensible consideration of sixteen thousand dollars, in fact the lands pretended to have been conveyed were worth more than that amount.

Second. That Baker, Robinson and Morse Rohnert, on or about the 3d of April, 1893, acting as a board of directors, pretended to hold a directors' meeting without giving due notice to all the directors as the charter requires, and thereat did pretend to ratify the sale that had been previously made by the president and secretary.

Third. That on or about the 4th of April, 1893, the president pre-

Wisner vs. Delhi Land and Improvement Company.

tended to call an annual meeting of the stockholders, without giving to petitioner or any other stockholder any notice of said meeting; and that said meeting, not constituting a majority of stockholders *in number*, elected a board of directors for the year ensuing, "and by a majority vote of those present confirmed the act of the board of directors at its last meeting, in which said board had authorized the president and secretary to make another deed to the land sold."

Of the proceedings related complaint is made that on account of certain informalities and illegalities therein "the sale is fraudulent, null and void, for the following reasons, viz.:

1. That the sale of all the property of the corporation is a practical dissolution thereof, in a manner different from that provided in its charter.

2. That the pretended meeting of the board of directors was illegal because proper notices thereof had not been given—three of the stockholders not being notified, and being, consequently, absent therefrom.

3. That the voting of the stockholders at the meeting was not by a *majority of the stockholders in number*; and that, while a majority of those voting held, or pretended to hold, a majority of the stock, *there was no evidence at the meeting* that the members voting were actual stockholders. That *Baker* was not, at the time, the holder of four hundred shares of stock of said corporation; and, if he was the owner of same, they are illegal, null and void, for the reason that he caused same to be issued to himself without any equivalent—neither money, property or labor having been paid therefor. That the stock voted by *Morse Rohnert* and *William E. Robinson*, at the stockholders' meeting, was illegal and void for the same reason.

4. That the Constitution and laws of this State prohibit the issuing of any stock by any corporation until same shall have been paid for.

5. That the sale is fraudulent, for the reason that *Baker*, *Rohnert* and *Robinson* conspired together to deprive your petitioner of his rights in said corporation, and if it is not revoked it will result greatly to his injury. And that the ratification of said sale is fraudulent for the further reason that *Robinson* was induced to vote at the stockholders' meeting in favor of the ratification of the sale, on the assurance of *Morse Rohnert*, *Frederick Rohnert* and *Baker* that he should still retain an interest in the lands pretended to be sold.

Thereupon an injunction was prayed for and obtained against the

parties and the recorder, prohibiting them from putting deeds to the property of record until further order of the court—the prayer of the petition being that the sale be annulled and revoked and the injunction perpetuated.

Upon the introduction of proof and trial had, there was judgment rejecting plaintiff's demands and affirming the legality of the sale, and dissolving the injunction. From that judgment the plaintiff has prosecuted a devolutive appeal.

From the foregoing synopsis of the pleadings it appears that the only complaint of the sale, in itself, is that the consideration was inadequate, and, as to the general effect of the sale, that it operated, practically, a dissolution of the corporation in a mode different from that provided in the charter.

All other charges and specifications relate to certain irregularities in the proceedings had by the board of directors and the stockholders at a general meeting, the purport and object of which were to ratify and confirm a sale of the property that was previously made to the defendant, Rohnert.

We gather from the admissions of fact contained in the petition that Baker, president, and Morse Rohnert, secretary, made a sale on the 27th of January, 1893, to Frederick Rohnert of *all* the real estate that the land company owned at the time for the expressed consideration of sixteen thousand dollars in cash—the expressed object of the sale being to raise the means necessary to pay immediately pressing debts of the corporation. That subsequently recognizing the fact to be that they, as president and secretary of the corporation, could not make a legal and valid sale of property of the corporation, without first being authorized by the corporation, the president called a meeting of the board of directors, and at the meeting thus called the previous sale was ratified. That immediately afterward the president called a general meeting of the stockholders and thereat a new board of directors was chosen, and by a majority vote at this stockholders' meeting the action of the former board of directors was ratified.

The only complaint that is made of this meeting of the board of directors is that *all* of the directors were not notified of the meeting; but it is not alleged that all the directors were not present at the meeting—participating therein.

And the only objection that is urged against the stockholders'

Wisner vs. Delhi Land and Improvement Company.

meeting is that not one of the stockholders was notified; but as it appears that the plaintiff as a stockholder was present and voted, and now urges as an illegality in the proceedings that *a majority in number of the stockholders* did not vote for the ratification of the sale, we must conclude that a majority of the stockholders was present and voting—the plaintiff being present and casting the only negative vote, and the majority of those present voting in the affirmative.

As a majority of the stockholders were present and participating, and those holding a majority of the certificates or shares of stock voted in favor of the ratification of the act of the board of directors in making the sale, it is difficult to perceive the basis of the plaintiff's objection—he having been present and participated in the meeting without protest or complaint of the *time or manner of its organization*, or as to the *right of the holders of majority of the stock* to control the election. The same is true of his complaint that there was no proof exhibited at the stockholders' meeting that the members voting actually held a majority of stock. There was scarcely a necessity for the *exhibition* of such proof at the meeting in the absence of any question or complaint on that score.

The further charge is made that Baker was not the real and actual owner of four hundred shares of stock, and if he was same were issued at his instance and request, and without any price or value having been paid therefor. And it is alleged that the same is true of the stock certificates that were issued to Morse Rohnert and William E. Robinson.

But in the defendant's exception the point is made that the plaintiff is estopped from questioning the legality of the stock which was owned and voted by said stockholders, on the ground that, as secretary of the corporation, he signed and issued same, and can not be permitted to question or impeach the validity of his own official action.

There is in the record—brought up in the original—a certificate which states "that Morse Rohnert is the *holder and owner* of one hundred and sixty-seven *paid-up* shares in the capital stock of the Delhi Land and Improvement Company, Limited." And this certificate bears this *jurat*, viz.:

"In testimony whereof the president and secretary have signed their names and caused the seal of the company to be affixed

Wisner vs. Delhi Land and Improvement Company.

thereto, on this the 4th of February, 1892, at Delhi, Richland parish, State of Louisiana.

(Signed)

"HIBBARD BAKER, *President*.

"EDWARD WISNER, *Secretary*."

On the same date two similar certificates were issued to Hibbard, representing four hundred *paid-up* shares of stock; and to Edward Wisner, the plaintiff, one hundred and sixty-six shares—all likewise signed. It thus appears that Baker and Morse Rohnert collectively owned and held possession of five hundred and sixty-seven *paid-up* shares of the company's stock, to the verity and genuineness of which he had certified as the secretary of the association. Not only is that the case, but these certificates were issued more than a year previous to the date of the transactions complained of, and the same were used, recognized and voted by Baker and Morse Rohnert at the stockholders' meeting—Wisner being present, participating and making no objection to their legality or genuineness, at a time when it was his duty to speak, if his charge is true.

This is not the case of an objection urged to the testimony of a *witness* on the ground that he cannot be heard to impeach the truthfulness of a certificate he had previously made as an *officer*. The plaintiff brings this suit for the annulment of a sale made by the corporation of which he is a stockholder and was *secretary*, on the ground that the sale was illegal, because the vote of the stockholders at the meeting at which same was ratified was illegal, for the reason that the stock voted thereat had been fraudulently issued and *without any equivalent value having been paid therefor*. How can he be heard to prove that state of facts, if true, to enable him to impeach and annul the sale for his own benefit and advantage? There may be circumstances under which such proof could be administered, but they certainly do not exist in this case. It is our deliberate conclusion that the estoppel urged is good and must be maintained, and the proof excluded from consideration.

In regard to the charge of conspiracy on the part of Baker Rohnert and Robinson to fraudulently deprive petitioner of his rights in said corporation, there is no adequate proof in the record, nor of the charge that Robinson was induced to vote for the ratification of the sale, because it was agreed that he was to have an interest in the property.

Brown & Bro. vs. Haynes, Administrator.

It is incontestible and undenied that the corporation owed debts which were large in amount and pressing in character, and that the only means the corporation had of raising the necessary funds was the sale of its property. It is quite true that a sale had to be made of *all* the property of the corporation; but that fact is of no especial significance when we consider that the very objects and purposes of the association were "to purchase, plat, improve and sell real estate." Consequently the dissolution of the corporation did not necessarily result from the sale of *all* the property the company chanced to own at the time. The proof is clear that the company had purchased and sold other properties; and that it was at the time of the sale in question negotiating for more. There is no proof of the sale having been made for an inadequate price. The price of sixteen thousand dollars seems to have been reasonable and fair when everything is considered. The result of the enterprise may have proven unsatisfactory and unprofitable. This transaction may have resulted injuriously to the plaintiff. But he will be compelled to submit to the common misfortune of those who embark in such adventures, of being overpowered by the majority of stock in a corporation of which he is a minority shareholder.

Viewing the question of want of previous tender from our present standpoint, it is unimportant. Though in such a case as this we are of opinion that the rights of the defendants could have been protected by a reserve in the judgment had one been rendered in favor of the plaintiff and appellant.

Judgment affirmed.

No. 1294.

C. A. BROWN & BRO. VS. G. B. HAYNES, ADMINISTRATOR.

When a motion is made in this court to dismiss an appeal, on the ground that the appellant has acquiesced in the judgment and consented to its execution, the cause will be remanded for the purpose of permitting the administration of proof on that question.

A PPEAL from the Fifth District Court, Parish of Ouachita.
R. W. Richardson, J.

Gunby & Sholars for Plaintiffs, Appellants.

Brown & Bro. vs. Haynes, Administrator.

Stubbs & Russell, Drew & Stewart and J. A. Dermen for Defendants and Appellees.

The opinion of the court was delivered by

WATKINS, J. Plaintiffs averring themselves, in their partnership capacity, owners of a certain saw-mill complete, including engine, boiler and fixtures, and twenty thousand feet of lumber; and that the defendant, as administrator of the succession of J. O. Rouschick, has advertised said property for sale as that of the succession, prayed for and obtained an injunction staying sale proceedings until the rights of property could be judicially tested and determined.

In an amended petition plaintiff laid claim to a lot of saw-logs in addition to the aforesaid property.

In answer to the original petition the administrator pleads, first, a general denial, and, second, that the saw-mill plant and fixtures had been sold by the plaintiff to the deceased, who was in possession; and that the plaintiffs, thereafter, operated same as the employés of the deceased and for his account; hence he prays the dissolution of plaintiff's injunction at his cost. His answer to the amended petition is a general denial.

On the trial there was judgment in favor of the plaintiffs, recognizing their ownership of the entire plant and property claimed—perpetuating their injunction; and from that judgment the administrator has appealed.

In this court the plaintiffs and appellees have filed a motion to dismiss this appeal, on the ground that the judgment appealed from has been acquiesced in. They aver that "they are in the peaceable, undisturbed possession of the property—the subject of the controversy herein—and have been in possession thereof since the rendition of the judgment herein appealed from. That they took possession of said property *with the full knowledge and consent of the defendant*, G. B. Haynes, administrator; and that said defendant has fully acquiesced in said judgment and consented to the execution of the same." Wherefore they pray that the appeal be dismissed.

The truth of the statement made in the motion is affirmed on the oath of one of the appellees.

Of course the appeal should be dismissed if, as the appellee's motion declares, the appellant has acquiesced in the judgment rendered and consented to its execution since same was rendered. If, indeed,

City of Monroe vs. Hardy.

the plaintiffs have been allowed to take open, peaceable and undisturbed possession of the property in dispute, as owners, with the full knowledge of the defendant administrator, that is the end of the case and there is nothing further left for us to decide.

But manifestly these are questions *en pais*, which require the administration of proof in the court of original jurisdiction—nothing appearing on the face of the transcript in respect to transactions occurring since the judgment was rendered in the court *a qua*.

For this purpose the cause must halt where it is until such proof is administered, and the cause must be remanded for that purpose.

It is therefore ordered, adjudged and decreed that the cause be remanded in its present situation to the court *a qua*, with instructions to the judge of the lower court to hear proof in regard to the defendant's acquiescence in the judgment, so that further proceedings can be had in the cause according to law; and it is further ordered that further proceedings herein be stayed until the further order of this court.

No. 1292.

CITY OF MONROE VS. WESLEY HARDY.

The Legislature may delegate to municipal corporations power to adopt and enforce ordinances of special local importance, though general statutes exist relating to the same subjects.

The same act may constitute a crime against the public law of the State and also a petty offence against a municipal regulation. The two offences are different, and each may be punished without violating any constitutional right of the party accused.

Violations of city ordinances may be tried and punished summarily without information or indictment or trial by jury.

A PPEAL from the Recorder's Court of Monroe.
Endom, J.

Thomas O. Benton, City Attorney, for Plaintiff and Appellee.

Gunby & Sholars for Defendant and Appellant.

The opinion of the court was delivered by

MCENERY, J. The defendant was convicted for playing within the limits of the city of Monroe a gambling game called "craps."

46	1232
46	1365
46	1232
123	434
125	174

City of Monroe vs. Hardy.

The State of Louisiana, by Act No. 7 of 1882, prohibits the playing of this game, and affixes a penalty for violating the same.

The defendant, because of this State statute, contends that the Recorder's Court of said city, before which he was convicted, had no jurisdiction to try the case, and that the city ordinance prohibiting the playing of the game of craps is null and void, being in contravention of the Constitution of the State.

The Legislature has delegated to the city of Monroe ample and complete power to regulate and preserve the good order and peace of the city. Gambling is denounced by the Constitution as a vice, and its regulation and prohibition fall within the police powers of the city.

In a certain class of offences there may be concurrent powers in the State and the municipal authorities to prohibit them. The decisions on this point have been so numerous and uniform in upholding this doctrine that it has passed as an elementary principle into the text-books. Cooley's Cons. Limitations, p. 242; Dillon on Corp., Vol. 1, Sec. 368.

The jurisprudence of this State is in accord with this doctrine. State vs. Fourcade, 45 An. 717.

In the 30 An. 454, it is said that fines may be imposed by municipal corporations for violations of their ordinances, and that the State may impose a fine for violations of the same act is well established. There can therefore be no objection to the municipal corporation imposing a fine for an act punished by a State statute, when the offence is of that nature that is embraced within the power of the municipal government to preserve public order and the public peace. The experience of municipal corporations will teach them which acts are of that nature that are likely to promote public disturbance, and in the exercise of their judgment in this direction there must necessarily be left to them a latitude of discretion which will not be disturbed by the courts unless in plain violation of personal rights.

In the instant case we do not see, nor is it contended, that any of the personal rights of the defendant have been violated. He has transgressed the State statute and is liable to punishment for so doing. He has violated a city ordinance enacted in the furtherance of the good order and peace of the municipal corporation. Here are two distinct offences—one directed against the police power of the State and the other against the municipal government. These

Wisner vs. Rohnert.

offences, committed by one act, are of that nature that two prosecutions can be instituted, since the State has delegated the power to the Mayor and City Council of Monroe to pass all necessary ordinances to preserve the good order and peace of the city.

It would serve no useful purpose to enumerate the offences daily punished by both the State and municipal corporations. It is sufficient to say that where the act falls within the delegated police powers to the city, the prosecution for its commission may be instituted by both the city and the State—in the former case, when the penalty imposed by the city is within the limits of the penalty it is allowed to impose, and does not exceed the limit imposed by the State. On this point the authorities are practically unanimous.

Judgment affirmed.

No. 1284.

EDWARD WISNER VS. MORSE ROHNERT.

In case a petition contains two distinct demands, one of which discloses a cause of action and the other does not, the latter may, on exception, be disregarded and the cause permitted to go to judgment on the remaining issue in the District Court.

If in such case the exception be improperly overruled by the judge *a quo*, and the ruling reversed in this court, and the remaining issue ascertained to be one not within the jurisdiction of this court *ratione materiae*, in consequence of said ruling, the appeal should be dismissed *ex proprio motu*.

A PPEAL from the Sixth District Court, Parish of Richland.
Ellis, J.

H. P. Wells for Plaintiff and Appellee.

Boatner & Lamkin for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. The averment of the plaintiff's petition is that in February, 1892, he executed a deed to the Delhi Land and Improvement Company, Limited, under certain conditions, to one forty-acre tract of land and one acre of land in the vicinity of Delhi, in the parish of Richland, and that at the same time and place said land and improvement company executed a deed in his favor to certain

Wisner vs. Rohnert.

pieces and parcels of land in the same vicinity, the two transactions being intended as an exchange *pro tanto*. That said deeds were placed in the keeping and custody of Morse Rohnert, the defendant, "with the understanding and express agreement that said deeds should not be recorded nor filed for record * * * until after the specific performance of a certain (other) agreement between the said land improvement company and petitioner, which agreement was in substance * * * that (petitioners) should pay, or cause to be paid, one-sixth of the indebtedness of said company as soon as the other stockholders should pay their proportionate parts of said indebtedness. That contemporaneously with the agreement and the delivery to the defendant of the aforesaid deed of the plaintiff, the former executed his obligation, in which he bound himself not to deliver said deed nor to permit the same to be recorded until after the delivery by him to your petitioner of the deed made by said land company in his favor."

That on or about the 27th of January, 1893, the defendant, in violation of his agreement, did cause, or permit the said deed of petitioner to the land company to be recorded, "greatly to the injury and detriment of your petitioner;" and plaintiff avers "that the permitting of the recording of said deed to said land company, or allowing same to pass from his custody, was in bad faith, and * * * that said violation of trust on the part of said Rohnert was expected and intended by said Rohnert to accrue to his personal benefit." That said violation of trust and agreement was and is productive of great injury to petitioner, and to the extent of the sum of five thousand dollars, to-wit:

"Petitioner is damaged in the sum of not less than one thousand dollars by the alienation from him of his property described in said deed, made by him to said land company without consideration, petitioner having received no consideration therefor. "Petitioner is further damaged in the sum of four thousand dollars by the reason that the said land company has pretended to dispose of all of the lands conveyed in both of the above described deeds; and that not without great cost and loss of valuable time, and the interference of business, can said agreement or contract with said Delhi Land and Improvement Company be enforced."

Wherefore plaintiff's prayer is "for judgment in and for the amounts above specified (to) be rendered against the defendant."

Wisner vs. Bohnert.

From a casual inspection of the quoted averments it is evident that there is not, nor could there be *any* contingency in which the District Court or this court could now, or at any time, have rendered a judgment *for more than one thousand dollars* in favor of the plaintiff, and hence this court has no jurisdiction *ratione materiae*. For the plain declaration of plaintiff's petition is that "he is damaged in the sum of not less than one thousand dollars by the alienation from him of his property described in his deed to the land company"—that is to say the *forty-one* acres that is covered by the deed—being an estimative value of twenty-five dollars per acre, an exceedingly improbable valuation. And its further declaration is that he is "further damaged in the sum of four thousand dollars by the reason *that the said land company* has pretended to dispose of all the lands conveyed in both of the above described deeds."

Granting this last declaration to be absolutely true in every particular, yet it is not alleged that the defendant was in any manner responsible for the damage that resulted. The land improvement company was not made a party to this suit. The defendant is not alleged to be an officer, director or stockholder of the company; nor is there alleged to be any privity of contract between them in respect to these transactions, from which, imputation of liability could be inferred.

In the court below there was first a judgment rendered in favor of the defendant, but on rule for a new trial that judgment was set aside and a new trial granted. On the second trial there was judgment in favor of the plaintiff for the sum of four hundred and five dollars, from which the defendant alone appealed.

In this court the plaintiff failed to answer the appeal and demand an increase of the judgment. This state of facts clearly characterizes the demands of the plaintiff—if that were needed—and furnishes confirmation of the view we entertain of the pleadings.

In the lower court the defendant filed an exception of no cause of action, which was undoubtedly directed at that part of the petition which refers to the damages that are alleged to have been suffered at the hands of the land improvement company. We are of opinion it should have been sustained to that extent, and the suit restricted to plaintiff's remaining demand, as the judgment evidently was. Had this course been pursued the demand against the land improvement company would have passed out of the case, and clearly ex-

Railroad Company vs. Elmore et al.

hibited the lack of jurisdiction in this court *ratione materiæ*. But as this was not done by the judge *a quo*, it becomes our duty to give effect to the plea of no cause of action in respect to the plaintiff's demand against the land company. And finding that no cause of action is stated in this respect, the remaining demand for one thousand dollars is not within our jurisdiction, and the appeal must be dismissed *ex proprio motu*.

It is therefore ordered, adjudged and decreed that the appeal in this cause be dismissed at appellant's cost.

Rehearing refused.

No. 1296.

VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY VS. MILO
ELMORE ET AL.

Parties without titles, occupying lands, may be joined as defendants in a suit for the lands by plaintiff asserting ownership. 2 Howard, 644; 1 Woods, 621; 28 An. 644.

Purchasers, under foreclosures of mortgages of railroad franchises and property, may organize a corporation under such name as they may adopt, which, by the organization, succeeds to such franchises and property and takes the corporate capacity of the corporation against which the foreclosure proceedings were conducted. Act 38, 1877; 148 U. S. 397.

The grant of lands by the United States in aid of a railroad, the State named as trustee for the road, the lands to revert to the United States if the road is not completed in ten years, the lands being identified by the grant and the listing approved, as directed by the act of Congress, vests title in the railroad company, although the road is not built within the limited time specified in the act, the grantor not insisting on the reversion, but accepting the subsequent completion of the road as compliance with the grant. Act of Congress 3d June, 1856; 11th Statute at Large 18; 21 Wall. 44; 41 An. 896; 42 An. 1019.

The State, a mere trustee, can not declare a forfeiture of the lands granted. Act 39 of 1879; 44 An. 984.

Those who settle on such lands in the face of the grant can not hold against the railroad company, and are possessors in bad faith, though the settlements are in contemplation of homestead entries and are made after the ten year limit in the grant and the non-completion of the road within that period; for all gave notice that the grant by its terms takes effect from its date, and that conditions subsequent, i. e. the non-completion of the road, may be waived and can be insisted on only by the United States by declaring the lands open for entry or equivalent act revoking the grant. C. C., Arts. 503, 3450, 3453; 42 An. 1019; 41 An. 896.

The claim of a possessor in bad faith for alleged improvements is, at best, sparingly admitted; on the other hand he is liable for fruits during the entire period of his possession, and this court, without clear proof of same, will not disturb a verdict which compensates a claim for such improvements by the

46	1237
ei09	457
109	637
46	1237
112	60
113	329
46	1237
119	23
120	114

Railroad Company vs. Elmore et al.

liability of the possessor for fruits, the verdict not being complained of by the plaintiff. C. C. 503, 508, 2314; 16 La. 422; 12 An. 546; 33 An. 744; 41 An. 896; 42 An. 1007; 7 N. S. 112; 6 Rob. 192; 6 An. 356.

The verdict of the jury responds to the issues when the plaintiff suing for the land and its revenues, the defendant claiming the value of the improvements, the verdict determines that the demand for improvements is compensated by that for revenue, and the judgment following such verdict is unobjectionable. C. P. 519, 526; 5 M. 456; 3 R. 84.

Nor will such verdict and judgment be set aside merely because, after being charged, the jury were permitted to leave the court and separate before giving their verdict.

A PPEAL from the Fifth District Court, Parish of Ouachita.
R. W. Richardson, J.

Gunby & Sholars, C. Newton and Frank Vaughan for Defendant and Appellant.

Stubbs & Russell for Plaintiff and Appellee.

The opinion of the court was delivered by

MCENERY, J. This is a petitory action instituted by the plaintiff corporation against the defendants, who it is alleged "without any shadow of right or title" have entered upon a tract of land owned by plaintiff and described as the S. E. 1-4 of the S. W. 1-4; the E. 1-2 of the N. W. 1-4; the W. 1-2 of the N. E. 1-4; the S. W. 1-4 of the N. E. 1-4; the E. 1-2 of the S. W. 1-4; the S. E. 1-4 of the N. E. 1-4, Section 17, T. 17, R. 1, E., containing four hundred acres. It is alleged that the defendants are trespassers and have destroyed a large quantity of valuable timber and are still wasting the same to the great injury and damage of plaintiff; and that said defendants have occupied and cultivated said land for a period of five years. The prayer of petitioner is that the plaintiff recover judgment against the defendants, decreeing plaintiff to be the lawful owner of said land, and in the sum of five hundred (\$500) dollars on account of the destruction of the timber on said land, and for four thousand (\$4000) dollars for the use and occupancy of said land to the last day of January, 1892, and eight hundred (\$800) dollars annually from said date until the delivery of the property to petitioner.

The defendants filed an exception to the suit on the grounds, (1)

that there is a misjoinder of parties; (2) that the allegations in the petition are vague, indefinite and insufficient; (3) that plaintiff is without capacity to bring this suit, there being no such corporation under the laws of Louisiana as the Vicksburg, Shreveport & Pacific Railroad Company.

The exception was overruled and the defendants answered in substance as follows: That the plaintiff corporation has no title whatever to the land sued for, and that the claim for damages is extortionate, far exceeding the value of the land.

That the mortgage of said lands granted to said corporation by the Federal government by Act 3 of June, 1856, is null and void, as the road could sell only twenty miles of said lands at a time, as said road was completed; and therefore the State, holding the lands in trust for the purpose of constructing the road, could not authorize the mortgage of said lands for the uncompleted portion of the road.

That on June 3, 1866, all the lands between the Ouachita and Red rivers reverted to the Federal government, as on that date the road had not been completed, and became part of the public domain, and the defendants had the right to enter upon and homestead the same.

That the road was not located as provided by act of the Legislature in 1857, and they deny that the lands granted to the railroad were ever transferred to plaintiffs, directly or indirectly, in the proceedings of *Henry R. Jackson et als. vs. Jno. T. Ludeling et als.*, or were ever seized or sold by the marshal, or that said lands could be seized or sold, in any manner, for debt, or transferred, until the road had earned the same by its completion. That the Federal government, through its Interior Department, has refused to issue patents to plaintiff for said lands. That the road was not constructed on the faith of the grant of said lands; that the Legislature in 1879 declared the grant forfeited, and in 1886 declared that said road had no title to said lands. That the United States Register of the Land Office advertised said lands for entry, and defendants went on the same in good faith, believing them to be subject to homestead occupation. Defendants, separating in their defence, aver that each has made application for homestead entry, and designates the quantity of land applied for by each. The answer sets out alleged oppressive acts of plaintiff and prays for damages to the amount of five hundred (\$500) dollars.

The case was tried by jury and a verdict returned in favor of the

Railroad Company vs. Elmore et al.

plaintiff, as follows: "Full possession of all the lands sued for in this case (situated in section 17) and all the improvements thereon; said improvements going in lieu of and to offset the claim of the plaintiff for rent and damages, including rents for the present year." A judgment in favor of the plaintiff was entered in accordance with this verdict, except the order to deliver possession by January 1, 1894.

To this judgment the plaintiff excepted on the ground that it was not in accordance with the verdict, and assigned this as error. At this time we state that the delivery to the plaintiff could have been demanded when the judgment became final, and this extension of time could not injuriously affect the defendants.

EXCEPTION.

1. The petition charges that the defendants are trespassers upon the land to which the plaintiff asserts title. It is immaterial whether they set up claim to any particular part of the land as long as they are trespassers, without title, and possess the same, adversely to the true owner. They are sued jointly as naked possessors, and they have a common issue in resisting plaintiff's title. The defence of one is the defence of all the defendants, as each holds by virtue of the same title and are jointly interested in being maintained in possession. The primary question at issue is title to the property, and all the defendants are alike interested regardless of the quantity of land possessed by each. *Derbes et al. vs. Romero*, 28 An. 644.

2. There is no force in this objection. The petition contains every necessary and essential averment for maintaining the action.

3. We fail to see the application to defendants' argument to the facts in this case. The record is against the pretensions of the defendants. The plaintiff acquired title through the foreclosure sale, December 1, 1879. The mortgage creditors purchased the mortgaged property and organized the present company. The organization was perfected, literally, in conformity to Act 38 of 1877, and a statement of the organization and formation of the corporation in compliance with Sec. 3 of the act was filed with the Secretary of State. The defendants objected to the copy of this statement certified by the Secretary of State being introduced in evidence, because the act of incorporation was not made by authentic act, and the copy was not a copy of the authentic document which proves itself. The act did

Railroad Company vs. Elmore et al.

not require the formation to be by authentic act, and following the plain direction of the statute was sufficient. The statement of the formation of the company or corporation, when filed, became a part of the public archives and a certified copy of same is to all intents and purposes a copy of an authentic act, and authorizes its introduction as evidence. *State vs. Cannon, Sheriff*, 45 An., 1231; *State vs. Lake*, 45 An. 1207.

MERITS.

The defendants aver that they have made application for homestead on the lands as a part of the public domain subject to homestead entry. Their claims are based on notices of the Register and Receiver of the Land Office, at Monroe, La., inviting homestead settlers on the same. It is alleged that they had received instructions that the lands granted to the railroad company, between the Ouachita and Red rivers, had been open to public entry. No such instructions have been shown to have been issued, and it is a moral certainty that had they been issued, the original would be found in the government records at Washington. The fact is that, in 1856, Thomas A. Hendricks, Commissioner of the General Land Office, withdrew these lands from sale, on the expected approval of the act of Congress of June 3, 1856, by the President, and it may be safely asserted that since that date they have never been open to entry. This is corroborated by the decree of the United States Supreme Court, recognizing the force and validity of the mortgage placed on the railroad and these lands, and their sale under the decree of the court, and the repeated action of one of the executive departments of the Federal government in recognizing, on the certificates of the Governor of Louisiana, the claim of the road to the lands granted to it by Congress. This recognition is not found in this record, but it is a part of the history of the corporation—not important in deciding this case, but merely stated incidentally. The fact still remains that the lands have not been restored to the public domain and that no department of the Federal government has done any act to disturb the rights of the road to these lands.

The other matters alleged as defences in the answers do not concern these defendants and are personal to the grantor. It is immaterial to them whether the road in its construction was diverted from its original line; how the State disposed of the trust confided to it

Railroad Company vs Elmore et al.

by the General government; in what manner the lands were sold by the corporation; whether they were exempt from seizure and sale for debt; in what manner the road acquired possession of these lands; all these matters are questions for the Federal government to consider, and so long as it is satisfied with the manner in which the trust was executed and the road built, no one else can complain. It is very certain that the defendants can not act for the government, and by any act of theirs, or any judicial proceeding they may invoke, restore these lands to the public domain against the wishes and desires of the Federal government, the grantor.

We have mentioned these defences, as the defendants assert this case presents issues not heretofore decided by this court. But we think they are all embraced within the issues in the cases of the Railroad vs. Sledge, 41 An. 896; Mower vs. Kemp, 42 An. 1007, and State vs. Railroad Company, 44 An. 981. In these cases we decided that the government of the United States, not having asserted by legislative act or judicial construction the forfeiture for the breach of the condition, the apparent legal title is in the railroad company acquiring rights under the foreclosure of the mortgage. In other words the title of the railroad to the lands granted is good against anybody except the government of the United States. We did not discuss the rights of the road as against the Federal government, as our decree would not be binding upon that authority.

In the case of Railroad vs. Sledge the defendant entered upon the railroad land with the intention of acquiring the right to enter the land if ever it should be open to public entry. In this case the defendants made affidavits for homestead entries. But the land was not open for such purposes. The defendants may have been deceived, but this does not alter the character of their entry upon the lands of the plaintiff. They went on them without any color of right or authority and stand in the same position as the defendant Sledge in the case referred to. Possession is solely the *prima facie* evidence of title. The entry on the land was unlawful, and as no title other than the trespass is exhibited, the defendant can not dispute the apparent title of plaintiff. *Stille vs. Shull*, 41 An. 816.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

MILLER, J. The earnestness of the argument for a rehearing in this case has prompted us to a careful re-examination and, if our

conclusions prove disappointing to the defendants, we trust they will be accepted as the result of a diligent effort on our part to give to the controversy, previous phases of which have been before us, our best attention.

When defendants, sued for land, hold by different titles, they can not, as a general rule, be joined because their defences, necessarily, are different. In this case the defendants exhibit no title whatever, common or individual. There is, it is true, on the part of some of the defendants the averment that they made homestead entries of portions of the lands, but, in our view, such entries, even if sustained by proof, would not, under the circumstances of this case, distinguish the position of those who assert such entries from that of trespassers. Hence we have the case of plaintiff asserting title to a tract of land on which various persons have settled. The defendants are not distinguished by any difference in the titles they hold, for they hold none. They stand on one common ground of naked possession. We are aware of no rule or test by which plaintiff could divide his action. On the other hand, all these defendants have a common interest in disputing plaintiff's title. If plaintiff had brought as many different suits as there are defendants, all could join in the defence, and to the consolidation of the suit there could be no objection. If consolidation to save costs would have been authorized, the propriety is enforced of joining all these defendants in one suit. We think, therefore, the exception of misjoinder is not well taken. Support of this view is to be found in the general rules of pleading and, we are inclined to believe, admits of abundant support in authority. We find one case in point and those cited in plaintiff's brief, to which we have not had access, seem to sustain the pleadings in this case. *Derbes vs. Romero*, 28 An. 644; 16 H. 288; 18 H. 253; 2 H. 642. In the cases of *Gaines vs. City of New Orleans et als.* the defendants, charged as possessors in bad faith, were joined in one bill, as we remember the cases. *Gaines vs. Agnelly et als.*, 1 Woods, 238; *Gaines et als. vs. City of New Orleans*, 1 Woods, 104.

The defendants put at issue the corporate capacity of plaintiff. The Vicksburg, Shreveport & Texas Railroad Company was created in 1853 to construct a railroad from the Texas line to Vicksburg via Greenwood, Shreveport and Monroe. In aid of this railroad, or as the act expressed it "a railroad," between these points and the line stated, Congress granted in 1856 alternate odd sections of land for

Railroad Company vs. Elmore et al.

six sections in width on each side of the road. The grant stipulated the road should be constructed in ten years or the lands should revert to the United States. It is not disputed that the grant was accepted by the company, lands selected and the listing approved by the government, as provided by the Act of Congress of 1856. 11 Statutes at Large, 18.

Thereafter, in September, 1857, the company executed and issued bonds to a large amount, secured as usual in railway mortgages on its road-bed, lands and franchises, and the mortgage specially embraced the four hundred and twenty thousand nine hundred and twenty-four acres of land embraced in the grant. On these bonds, extant and unpaid in 1879, by appropriate proceedings in the United States Circuit Court, Fifth Circuit and District of Louisiana, the bondholders foreclosed their mortgage and at the master's sale under the decree of the court acquired, through a committee selected by them, the railroad, its lands and franchises covered by mortgage.

We do not appreciate that any objection is or can be urged to these proceedings. They exhibit the usual method by which railroad franchises are transferred when bondholders exact their rights.

It has never been supposed that such proceedings end the corporate existence, for, if this were the case, railroad mortgages would confer no rights and railroad bonds disappear as securities. It must be accepted, then, that the sale passed the corporate franchises to the purchasers. In that condition the purchasers availed themselves of the Act No. 38 of the Legislature of 1877, which authorizes the purchasers of railway property and franchises to hold all such property and operate the railroad the same as the company that executed the mortgage. The act further authorizes the purchasers to fix and divide the stock bought, adopt a name and organize anew the company by electing a board of directors. When all this was effected the act provided for the filing of the organization certificate in the office of the Secretary of State, and, this done, the act declares the company shall be deemed a body corporate under the name chosen as fully as if chartered anew by the Legislature. We find from the record that all these provisions were complied with by the purchasers, and the corporation once known as the Vicksburg, Shreveport & Texas Railroad Company has become the Vicksburg, Shreveport & Pacific Railroad Company, if there is any virtue in the judicial proceedings to foreclose the mortgage and the Legislative Act of

1877. There was no creation of any new corporation, but the continuation of a subsisting corporation under a new name. The act has stood unchallenged for years, nor is the court advised of any ground on which it can be assailed. It is not of easy application that there can be repugnancy to the organic law and legislation of this character, so necessary to give effect to the changes so apt to occur in the operation of railroads. The court conceives the present Vicksburg, Shreveport & Pacific Railroad Company must be deemed clothed with all the rights of its predecessor, and is a subsisting corporation and is competent to stand in judgment.

Nor can it be denied that the lands sued for in this case are embraced in the grant of 1856. Unless that grant has been withdrawn or annulled, the present corporation is vested with title to the lands. These defendants insist the lands have reverted to the United States by the lapse of time—i. e., the ten years. That the company did not build the road on the original line; that the Legislature of Louisiana has declared the grant forfeited, and other defences are advanced assailing the right of the corporation to the lands granted. It is true the railroad was not completed within the time stipulated in the grant. It is also true, we believe, there was a deviation from the line originally designed for the road. But it is equally true the road has been completed and the United States has never insisted on any cause of forfeiture and has never forfeited the grant. From time to time the certificates of the completion of the road have been filed in the office of the Commissioner of the General Land Office, and, though long after the ten-year limit, have been accepted as satisfactory evidence of compliance with the grant. So long as the grantor interposes no objection, we can not perceive the right of defendants to urge non-compliance with conditions we must deem waived by the grantor. We do not enlarge on this point because, in our view, unnecessary, especially in view of the elaborate decisions in 41 An. 896; 42 An. 1007, and 44 An. 981.

Nor can we understand how the State of Louisiana can forfeit lands or declare annulled the grant of 1856. The State has no interest. It was the trustee under the act of 1856, but its functions have long since ceased, and before the legislative act in which it undertook to annul the grant. 44 An. 981.

We have given careful attention to the claims advanced in behalf of some of the defendants that they hold under home-

Land vs. Wife.

stead entries. If such entries had been made they would have been in the face of the grant and with the implied notice that the grant stood, notwithstanding all conditions and limitations, unless insisted on by the United States. In our view the proof fails to show any homestead entries except those held for cancellation by the officials of the land office. In our opinion the defendants stand simply as trespassers without title. It is well settled within our jurisprudence that claims for improvements by defendants in this position are admitted sparingly. We find no evidence in the record that defendants have made improvements of that character that some cases have recognized as affording a basis for a claim against the owner. 16 La. 414; 3 R. 317; 12 R. 254. But, waiving this question, it is settled that trespassers, without title and without knowledge or presumed knowledge of the title of the owner, owe fruits from the date of their possession, and we see no objection to the verdict and judgment that compensates any supposed liability for improvements by the claim of plaintiff for rents and revenues. 7 N. S. 112; 6 R. 192; 12 R. 256. The verdict was for plaintiff, with the addition of compensating the claim for improvements with that for revenue; judgment followed the verdict and both substantially responded to the issues, and we do not think the objection of the defendant on this ground is well taken.

It is undoubtedly better that juries should be kept together after the charge and it is impliedly required by the Code. But merely because in this case there was a separation, we do not think the verdict should be set aside.

Rehearing refused.

No. 1285.

W. B. LAND VS. SARAH E. MARTIN, HIS WIFE.

A PPEAL from the Sixth Judicial District Court, Parish of Richland. *Ellis, J.*

The opinion of the court was delivered by McENERY, J.

Action for divorce.

Judgment of lower court reversed.

The case only involved facts.

No. 1291.

THE STATE OF LOUISIANA VS. PETER LOUIS.

46 124.
52 213

ROBBERY IN ONE COUNT AND SHOOTING WITH INTENT TO MURDER IN ANOTHER COUNT.—The accused was charged in an information with robbery in one count, and shooting with intent to murder in another count.

A general verdict of guilty was found against him.

After conviction he interposed a motion in arrest of judgment.

After hearing upon this motion the prosecutor entered a *nolle prosequi* as to the first count, and the court sentenced the accused under the second count.

A DEFECTIVE COUNT.—The verdict embraced the two counts of the information, and although the first count was vicious the verdict is not disturbed as to the count that is good.

The effect is the same as if the vicious count had been quashed as defective. The accused was sentenced under the good count.

SURPLUSAGE.—The defendant was charged in the second and good count with shooting with intent to murder, under circumstances other than those mentioned in Sec. 790 of the Revised Code.

The "robbery" charged in the first count was surplusage in so far as related to the second and good count.

THE SECTION UNDER WHICH THE INFORMATION WAS FRAMED.—The accused was not prosecuted under Sec. 790 of the Revised Statutes.

The information was framed under Sec. 791 of the Revised Statutes, and complies with the requirements of that section.

A PPEAL from the Twentieth District Court, Parish of Ascension.
Guion, J.

J. P. Madison, District Attorney, for the State.

R. N. Sims for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The information filed in this case in two counts charges, that one Peter Louis, late of the parish of Ascension, on the 24th day of September, 1893, upon Leberte Corsico feloniously did make an assault, and him, the said Corsico, in bodily fear and danger of his life, then and there feloniously did put; six dollars of the money, chattels and goods of the said Leberte Corsico from the person and against the said Leberte Corsico then and there feloniously did steal, take and carry away, contrary to the form of the statute of Louisiana, in such cases made and provided, and against the peace and dignity of the same; and the said District Attorney aforesaid, who prose-

State vs. Louis.

cutes as aforesaid in the Twentieth Judicial District Court in and for the parish of Ascension, gives the court here to understand and be informed that said Peter Louis aforesaid, late of said parish, at the same time and place, having, as aforesaid, assaulted and robbed said Leberte Corsico, did then and there with force and arms, in said parish and within the jurisdiction of said court, wilfully, feloniously, and of his malice aforethought, shoot one Leberte Corsico in the peace of the State then and there being, with a dangerous weapon, to-wit: a pistol, with the intent the said Leberte Corsico then and there feloniously, wilfully and of his malice aforethought to kill and murder.

The accused was tried and found guilty.

From a sentence condemning him to be imprisoned in the State penitentiary at hard labor during twenty years, the accused prosecutes this appeal.

In his motion, in arrest of judgment, the defendant averred that the first count of the information does not set forth the commission of a crime, and that the second count does not allege the commission of a crime in connection with the offence charged in the first count; that it charges a distinct offence without alleged identity between the person referred to in the first count as having been robbed and the person referred to in the second count as having been shot; that a prosecution under Art. 809, Revised Statutes, is wholly inconsistent with a prosecution under Art. 791, Revised Statutes, under which sections the State has declared.

After this motion in arrest of judgment had been submitted to the court for decision, the State entered a *nolle prosequi* as to the first count of the information, and sentence was thereafter passed upon the accused as to the second count.

In an assignment of errors, filed before this court, the defendant, through counsel, submits the following points:

1. That the withdrawal of the first count eliminated from the crime charged the essential ingredient of robbery, and he could not be sentenced under Sec. 791 of the Revised Statutes..

2. That the verdict and sentence are *ultra vires*, null and void, because defendant could not be held to answer to an information charging him with shooting with intent to murder in the perpetration of the crime of robbery. That the State could proceed against him on such a charge only by indictment.

A DEFECTIVE COUNT AND A GOOD COUNT.

All the grounds, briefly stated, in the order presented are :

1. That the State could not enter a *nolle prosequi* as to the defective count and sustain application for sentence on the remaining count.

The defendant pleaded to the information without calling on the prosecutor to elect and without motion to quash.

He was found guilty on each count.

The first being vicious was abandoned, the second remained.

The charge in the first count was treated as surplusage and withdrawn. It being separate and distinct from the good count, it could be quashed and the accused sentenced under the former.

Mr. Wharton, in his work on Criminal Evidence, p. 138, says:

"All unnecessary words may on trial or assent of judgment be rejected as surplusage if the instrument would be good on striking them out."

This court has approvingly quoted this section as applying to the quashing of vicious counts. The State of Louisiana vs. Thomas Brown, 35 An. 1058.

The effect in this case of entering a *nolle prosequi* as to the vicious count after a general verdict of guilty is the same as if the vicious count had been quashed.

The text writers, upon the subject, and jurisprudence unite in announcing that a bad count may be quashed without affecting the prosecution under the count not vicious.

If an indictment contains a good count a motion to quash should, as to it, be overruled. 30 An. 403; Whar. Crim. Plead., Sec. 394; 1 Bishop, Crim. Prac., Sec. 764.

2. SURPLUSAGE.

That the *nolle prosequi* as to the bad count carried with it the essential ingredient of robbery found in the second count, and that, in consequence, he could not be sentenced.

We have not discovered the merits of this point.

The section under which the information was framed provides that "whoever shall shoot * * * with intent to commit murder, under any other circumstances than there mentioned in the preceding section, shall, on conviction, suffer imprisonment at hard labor, or otherwise, for not less than one nor more than twenty-one years." R. S., Sec. 791.

Ross vs. Enaut et al.

Shooting with intent to murder under other circumstances than those mentioned in Sec. 790 of the Revised Statutes is the crime charged in the information and of which the accused was pronounced guilty.

Robbery is not one of the ingredients of the crime for which the accused was sentenced, and the "robbery" set forth in the bad count was surplusage in so far as related to the second and good count.

3. THE SECTION OF THE REVISED STATUTES UNDER WHICH THE INFORMATION WAS FRAMED.

That the second charge, which has direct reference to the first charge of robbery, comes within the provisions of Sec. 790 of the Revised Statutes, and the prosecution for that crime is limited to indictment (Cons., Art. 5) and is not possible by information.

The second count—i. e., the good count, contains a mere reference to the charge in the first or bad count. In setting aside the first count the charge of robbery was eliminated altogether. It is no part of the *gravamen* of the second count, and the reference to it was properly treated by the trial judge as mere surplusage.

He was not charged with "lying in wait" nor with robbery, and therefore was not prosecuted under Sec. 790, requiring presentment or indictment by grand jury.

He was prosecuted under Sec. 791 and found guilty of shooting with intent to murder under other circumstances than those mentioned in the preceding section—a crime which may be charged by information of the prosecuting officer.

The foregoing are the grounds urged to reverse the proceedings of the District Court. They do not establish that error has been committed on account of which the appeal should be reversed.

Judgment affirmed.

No. 1297.

CHARLES H. ROSS VS. L. ENAUT ET AL.

ON MOTION TO DISMISS THE APPEAL.

This case is within the jurisdiction of this court, being a suit against different persons who are interested in maintaining the title to a tract of land. A decree of nullity would affect the title of each. They are, therefore, interested alike without regard to the extent of their respective claims.

46 1250
48 356
46 1250
e109 457

Ross vs. Enaut et al.

ON THE MERITS.

A mortgage was due to the "Consolidated Association of the Planters of Louisiana." The tutrix sued out an injunction against the foreclosure of the mortgage. The issues raised were decided against her. She had the right to stand in judgment.

Her wards are concluded by the judgment, and at their majority are without right to reopen questions finally settled.

Status reipublicæ maxime judicatis rebus continetur.

Informalities of a sale are cured by the prescription of five years.

ON APPLICATION FOR A REHEARING.

Proof establishing that plaintiff was divested of his title, subsequent to the sale of his property by another, whose right to sell he disputed, having been admitted without objection, he can not recover the property, to which he no longer has title.

The value of the land involved, the revenues and the improvements to be partitioned in case of judgment for plaintiff, enter into consideration in determining jurisdiction.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Newton, J., ad hoc.

Gunby & Sholars for Plaintiff and Appellee.

Boatner & Lamkin and *Potts & Hudson* for Defendants and Appellants.

The opinion of the court was delivered by

BREAUX, J. The action was instituted to recover one-fourth interest in a square of land in the city of Monroe. The late James Hart bequeathed this square to the plaintiff, his mother and his two sisters.

Plaintiff alleges that on the 20th of January, 1881, his mother individually sold to Annie E. Livingston a part of the square; that on the 5th day of February, 1893, the sheriff sold the remainder of the land to the "Consolidated Association of the Planters of Louisiana" under an order of seizure and sale issued on a pretended twelve months' bond, executed by his mother in the suit of the Consolidated Association *et al.* vs. James W. Mason *et al.*, filed November 23, 1870, to enforce a mortgage against the entire property left by James Hart, which proceedings were enjoined by Ben Hart and J. W. Locke, executors of James Hart; that on the 17th June, 1876, by way of compromise, the executors and his mother as principals executed this pretended twelve months' bond in favor of

Ross vs. Enaut et al.

the "Consolidated Association of the Planters." That there was no advertisement and no adjudication of the property and the bond was a conventional agreement on which process of law could not issue so as to bind third persons. That on 30th April, 1881, the "Consolidated Association" caused an order of seizure and sale to issue as if it had been a twelve months' bond with vendor's lien, under which the sheriff seized the property and finally sold it to that association on February 5, 1883; and that subsequently the association sold the land to Richard Sinnott.

The defendants interposed peremptory exception of *res judicata* and estoppel, in which they allege that the questions and issues raised had been decided in the suit of plaintiff acting through his tutrix and legal representative in the suit No. 800 of the docket of the District Court of Ouachita parish, and in other suits instituted before that court.

This exception was referred to the merits.

In their answers they set forth their grounds of defence and especially plead that the action to annul the sale in contest is barred by the prescription of five years.

The facts are that on the 17th day of April, 1830, the "Consolidated Association of the Planters" secured a loan by mortgage on a tract of land adjacent to Monroe containing the pact *de non alienando*.

In course of time it became the property of Dr. John Calderwood, who sold to James Hart, subject to the mortgage.

The "Consolidated Association" brought suit against the original mortgagor and against James Hart, the possessor, to enforce the mortgage.

This defendant, Hart, filed a peremptory exception in that suit on the following grounds:

That the land was not accurately described; that the mortgage was in the French language and therefore not the notice required.

Hart having died, his executors were made parties to the suit and contradictorily with them a judgment was obtained for the sum due, and recognizing the mortgage. The judgment was affirmed on appeal.

In execution of this judgment the property was seized. It failed to sell for cash and was readvertised for sale on twelve months' credit.

When about to be sold the sale was enjoined by the executors of James Hart's estate and by Mrs. Bracey, the tutrix of plaintiff.

The injunction was dissolved. The evidence that a sale followed the dissolution of an injunction consists principally of recitals on a twelve months' bond given by these parties for the price.

After the statement in the bond that the price is one thousand eight hundred and ninety-six dollars and ninety-seven cents, with legal interest, it is declared that the purchasers were the last and highest bidders of the property mortgaged, and that the property was seized to satisfy an execution issued in the suit entitled the "Consolidated Association of the Planters" vs. J. W. Mason *et al.*, No. 800, "which, after complying with all the forms of law, was, on the 17th day of June, 1874, offered for sale on a credit of twelve months and adjudicated to said Locke and Hart, executors, and Louisa C. Bracey, wife of S. L. Bracey." This bond is dated the 17th day of June, 1876. This property was seized.

The sale was enjoined by plaintiff's mother and tutrix, who alleged in her petition for the injunction that personally and as tutrix, she owned the property under the terms of the will of the late James Hart.

That the bond was not a twelve months' bond, but a mere conventional agreement. That preceding the execution of the bond no sale had been made.

The sheriff and the bank answered. After trial judgment was pronounced for the latter. From the judgment, plaintiff having appealed, this court decided "that a party signing a twelve months' bond is not permitted when execution issues thereon, under Article 720, C. P., to arrest the writ, on the ground that there was no seizure, advertisement and sale of the property in the case in which the bond was furnished, the bond reciting that all the requirements of the law had been complied with. By signing the bond such party has cured all the irregularities, if any existed," citing authorities. Mrs. Louisa Bracey and Husband vs. S. E. McGuire, Sheriff, *et al.*, 34 An. 997.

The property, on the 8d day of February, 1883, offered for sale under the bond, was adjudicated to the "Consolidated Association" in satisfaction of its mortgage, and possession was taken by the purchaser. In February, 1883, Mrs. Bracey, individually and as tutrix of plaintiff, sued the warrantor of her title and obtained judgment against her for five thousand dollars.

She alleged that she had been evicted from the property. A compromise was effected between plaintiff in the case and her warrantor;

Ross vs. Enaut et al.

the latter paid two thousand dollars, and the judgment obtained by the plaintiff against the warrantor was transferred in accordance with the terms of the compromise.

The plaintiff in this case denies the signature to a letter of transfer of this judgment, purporting to be his.

MOTION TO DISMISS THE APPEAL.

The square involved in this suit has been divided into lots belonging at this time to separate owners.

As to two of the defendants, plaintiff and appellee moves to dismiss the appeal on the ground that the amount in dispute as to them does not exceed two thousand dollars.

Each of these defendants traces his title to one author and is interested in maintaining the sale attacked by the plaintiff. If nullity be decreed it will have the effect of absolutely destroying each title. The validity of the *mesne* conveyances under which each holds is not at all at issue. All interest centres in the deeds assailed. The value of the property involved determines the jurisdiction of the court. That property involved in this case in which each of the defendants is interested in maintaining the title is of a value within this court's jurisdiction. A similar question was determined in *Derbes vs. Romero*, 28 An. 645. Multifariousness of suits is to be avoided if consistent with reasonable interpretation of the laws conferring jurisdiction.

FORECLOSURE OF MORTGAGE.

The plaintiff and his co-legatees received the property burdened with a mortgage. In the first suit filed to foreclose, the testator was the party defendant, and at his death the executors of his estate became his defendants.

Contradictorily with them the consolidated association obtained a judgment decreeing that the property was sufficiently described and the registry legal.

INJUNCTION.

Subsequently the executors and plaintiff's tutrix, in an injunction, assailed the mortgage and alleged the irregularity of the proceedings.

This injunction was dissolved and judgment pronounced for plaintiff maintaining the mortgage and ordering the property to be sold.

SALE.

At the offering that followed, plaintiff's mother and the executors became the adjudicatees.

The property was not sold when offered for cash; it was readvertised for sale on twelve months' bond, and it was at this sale that they, plaintiff's mother and the executors, became adjudicatees.

TWELVE MONTHS' BOND.

Some time after the year had elapsed execution was issued on the twelve months' bond for the purchase price.

The mother of plaintiff, individually and as tutrix of her minor children, Charles H., Hattie and Katie, sued out an injunction on grounds pleaded by plaintiff in the present action.

This court, on appeal, maintained the legality of the twelve months' bond and of the proceedings preceding the bond, and specially decreed that the adjudication under which the property passed from the ownership and possession of the bank's mortgage debtor to the purchasers, Mrs. Bracey and the executors, was legal. All the points now presented have been previously decided in suits of record. After the several decisions that must be held as conclusive upon those who were parties, the "Planters' Association" became the purchaser, and the defendants now trace their titles to that purchase.

MINORS' INTEREST.

It only remains for us to determine whether the proceedings bind the minors at their majority; in other words, whether the tutrix had authority to appear and plead in their behalf.

It does not admit of question that a minor can be represented in judicial proceedings by a tutor acting for and in his name.

The tutor has authority to sue and protect the interest entrusted to him.

RES JUDICATA.

It necessarily follows that the effect of *res judicata* extends to the minor thus represented.

Ordinarily, if a tutor acts injudiciously in litigation in which his ward is interested, he is responsible and must indemnify him for the loss thereby occasioned.

If fraud and downright wrong are committed, to the minor's prejudice, they would vitiate the proceedings and possibly not prove a protection to any title.

Ross vs. Enaut et al.

Neither error nor fraud is suggested in the case at bar as having been committed by the tutrix, who sought to protect her minor children, by invoking the aid of the courts to prevent the sale of property in which they had an interest.

The court in Beard, Tutor, vs. Morancy, 3 Robinson, 121, summarily disposes of the question in a petitory action: "We lay out of view the exception to the want of authority in the tutor to institute this suit."

The law regarding *res judicata* makes no distinction; the minor himself, "when represented, is equally bound by the authority of the thing adjudged, the sanction of which is founded on the safety of society itself."

Status reipublicæ maxime judicatis rebus continetur.

Louisiana State Bank vs. Orleans Navigation Company, 3 An. 313.

THE TUTRIX HAD THE RIGHT TO PURCHASE.

With reference to possible prejudice resulting to the minor's interest in these proceedings, it was argued that the tutrix was without right personally to buy the property at the sale made in 1876.

This on the part of plaintiff assumes that the tutrix personally had no interest in the property, an error of fact, for she was a co-legatee of the plaintiff and one of the joint owners.

By Act 26th February, 1841, No. 30, a tutor may purchase in the same cases as an executor, curator or an administrator; that is, when she is a partner in community, or an heir or legatee. There was no conflict of interest.

It is also urged in argument that the plaintiff is not concluded by the appearance of his tutrix in these suits for the reason that there was a conflict of interest, and that action should have been left to the under-tutor.

There was a joint and not an antagonistic interest between the tutrix and the minors.

She, as a debtor personally and as tutrix, defended the cases and sought to escape from payment of the debt, in their interest and in her own.

Her interest and duty were not at all at variance.

SUIT AFTER EVICTION FOR VALUE OF PROPERTY.

Having been evicted, after judgment she accepted the inevitable and instituted suit against the warrantor to recover the amount due her and her children because of the eviction.

It was her right and duty to thus seek to protect their interest.

She obtained a judgment against the warrantor for the value of the property from which they had been evicted, in April, 1884, a few months prior to the majority of plaintiff.

In her petition for the judgment she admitted the legality of the proceedings for eviction.

The judgment obtained remained unquestioned as to its legality.

COMPROMISE.

Propositions of compromise between the creditor and judgment debtor were considered, and finally resulted in the acceptance by plaintiff's mother of an amount less than the face of the judgment obtained.

The attorney who represented the warrantor testifies that in the settlement made he required that all the heirs who were minors at the time the suit was brought, who had arrived at the age of majority, should be parties to the settlement; that in consequence powers of attorney were obtained from the heirs absent and the compromise effected.

These powers of attorney are lost and witnesses could not prove the full scope of the power conferred.

Careful and reputable attorneys at the time thought it was sufficient and the compromise was made.

The name of plaintiff, with the names of his co-legatees, is signed to a transfer of the judgment obtained, made, the receipt states, for a valid consideration. The plaintiff as a witness denies the genuineness of the signature purporting to be his, and he adds that he does not think that it was written by his mother, who held his power of attorney. The mother was not called upon to testify in the case.

We do not question the truthfulness of plaintiff's testimony regarding his signature to this receipt. The fact remains that it may have been signed by some one empowered to sign; that during many years the transaction was unquestioned.

Third persons who are purchasers can not be affected by these latent defects. They had the right to presume that the receipt was signed by the plaintiff. Granted all that is claimed in behalf of plaintiff in reference to the receipt and leaving it out of consideration entirely, the plaintiff is confronted by the judgment obtained by his tutrix, and which she, after his majority, collected for his and

ROSS vs. Enaut et al.

co-creditors' account, and by the proceedings which led to the judgment—all admitting the validity of the action to which he had been subjected.

IF ERROR WAS COMMITTED TUTRIX WAS RESPONSIBLE.

If the tutrix has committed an error, it would be at most one of judgment, for which she would become responsible to the heirs for whom she acted, in compromising a judgment obtained in her name, and which, in so far as third persons are concerned, has all the characteristics of unqualified acquiescence by the heirs.

PRESCRIPTION.

The defendants plead the prescription of five years as curing all informalities connected with, or growing out of, any public sale made by any person authorized, as applying "whether against minors, married women or interdicted persons." C. C. 3543.

Contradictorily with the tutrix, authorized to represent her minor children, regarding the very property involved and the title now assailed on the grounds now alleged by plaintiff, this court held, "besides," it would seem, that the lapse of five years has ratified what irregularities may have existed. 34 An. 997 (already cited).

The twelve months' bond in question contains the declaration that the proceedings upon which it was based were regular. These declarations have been accepted as correct in a decision of this court.

Subsequent to that decision, the tutrix, in her suit against the warrantor, judicially admitted—

That the property had been seized, advertised and regularly sold.

If there were irregularities, they are barred by the prescription pleaded.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that plaintiff's demand be rejected at his cost in both courts.

ON THE APPLICATION FOR A REHEARING.

BREAUX, J. Impressed by the earnest application of counsel for a rehearing, and the commendable zeal it manifests in behalf of his clients, we have re-examined the voluminous transcript from cover to cover, and laid it aside convinced of the correctness of our decision, upon the points urged, on the previous hearing.

When the property in question was inherited by plaintiff's mother, sisters and himself, it was subject to a mortgage, and a suit to foreclose that mortgage had been instituted against their testator, James Hart, who was in possession as owner.

As one of the adjudicatees of the property, in these proceedings foreclosing the mortgage, the mother of plaintiff, with the executors, executed a twelve months' bond, and thereby each acknowledged his ownership in the proportion of one-third—i. e., plaintiff's mother one-third, and the remainder for the estate.

A writ of *fi. fa.* having issued on the twelve months' bond, the tutrix sued out an injunction, in which she alleged all the defences pleaded by the plaintiff in the suit at bar. The demand of the tutrix in the injunction proceedings was rejected. It was decreed that she was bound by the proceedings, and that the irregularities pleaded were closed by the bond.

The property was sold contradictorily with the executors and the tutrix, and adjudicated to the Planters' Association, thereby completely divesting the executors and the tutrix from their ownership.

If the executors had any claims in the property prior to this last sale, they were transferred to the adjudicatee. They were parties to the proceedings, and are bound by the adjudication. Since that sale Mrs. Bracey, personally and as tutrix, and the executors have no right to the property. The property passed out of their possession and ownership.

John Calderwood, the vendor of James Hart, being dead, suit was instituted by plaintiff's tutrix against the legal representatives of his succession (warrantors of the title transferred by Calderwood to Hart to the property involved in this case).

The plaintiff in that case recovered judgment against them as warrantors of the title.

In a compromise an amount was received in satisfaction of the judgment.

The plaintiff executed a power of attorney, which was lost. He was of age at the date of the compromise. From the evidence it is fair to infer that it was sent to his mother to sign as his agent, transferring the judgment obtained by her, as tutrix and personally, against the warrantor.

The power of attorney was considered at the time as giving ample authority to the agent to effect the compromise.

Ross vs. Enaut et al.

Regarding the signature to the transfer still extant, the attorney representing plaintiff's mother testifies that he made a written memorandum at the time of the fact that, Mrs. Bracey had signed plaintiff's signature.

There is sufficient affirmative proof of a power of attorney. The evidence relating to the signature was sufficiently direct as to render it incumbent upon him to introduce his mother as a witness to disprove that she signed his name as a witness.

If she signed plaintiff's name, as we have every reason to believe from the evidence that she did, the testimony admitted to prove the authority given in the power of attorney satisfies us that she was duly authorized.

It therefore is proved that with his consent, his (plaintiff's) mother and tutrix received the value of the property claimed by her for him when he was a minor—in other words, through her he accepted the eviction as legal and binding.

It is urged that in any event, as to one of the defendants, Hardin, we should change our decree; that he bought from Mrs. Bracey personally, prior to the last sheriff's sale and before her divestiture of title at that sale, and that he has not interposed the pleas of *res judicata* and *estoppel* in his separate defence in this case, and, therefore, can not be benefited by those pleas filed by his co-defendants.

As a proposition of law we agree with plaintiff's counsel in so far as relates to the plea of *res judicata*. It must be specially pleaded.

As to the plea of *estoppel*, though not specially made, the defendant, in objecting to the admissibility of testimony, did urge the grounds against admission that plaintiff was estopped.

It is argued that Mrs. Bracey sold the lot to him prior to the last sale, and that in consequence she sold it at a time that there was an interest remaining in the estate of James Hart, testator.

Without any objection whatever on the part of plaintiff, the defendant proved that subsequent to her sale to him the tutrix and her co-owners were completely divested of all title.

The plaintiff is confronted with the last deed, which we can not overlook, having been admitted in evidence without the least objection. An owner who allows proof admitted is bound by that proof. Plaintiff can not recover property of which he has been divested, be the date of divestiture what it may.

The plaintiff reiterates that the court is without jurisdiction in so

Crawford et al. vs. Binion.

far as relates to the defendant Hardin; that he held a title distinct and separate from that of his co-defendant.

His title is as dependent upon the regularity of the proceedings as those of his co-defendants.

It is the same, save that he purchased prior to the last sale made—i. e., prior to the sale to the Louisiana Association of Planters.

After the divestiture by the effect of the last sale was proved, it was in all respects the same. He is therefore interested in all the proceedings from commencement to end. If this court had annulled the proceedings his title would have been annulled.

Moreover, this defendant claims his improvements, amounting in value to more than two thousand dollars.

The plaintiff claims the revenues and the land, of which the improvements are a part by destination.

The value of these improvements and the rental value of the property are admitted. The pleading limits the claim for improvements to one fourth. Had the judgment been affirmed and the decree rendered in conformity with the pleading, a partition of these improvements would have been ordered of property of value within the jurisdiction of this court.

Rehearing refused.

MCENERY, J., recuses himself, having been of counsel.

No. 1286.

JNO. W. CRAWFORD ET AL. VS. ROBERT L. BINION.

The court where the property is situated has jurisdiction of a suit to have property sold to effect a partition of property of which minors, who are absentees, are co-proprietors with major heirs who are present, and the surviving wife. 31 An. 572.

In the suit minors who are absentees are properly represented by a curator *ad hoc*. Purchasers at judicial sales are protected by the judgment decreeing the sale.

A PPEAL from the Sixth District Court, Parish of Richland.
Cary J. Ellis, J.

J. W. Willis and Gunby & Sholars for Plaintiffs, Appellants.

Potts & Hubson, and H. P. Wells for Defendant and Warrantor, Appellee.

46	1261
49	1637
46	1261
112	100
46	1261
115	424
46	1261
117	748
46	1261
120	41
46	1261
e122	1044
122	1045

Crawford et al vs Binion.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs sue for the recovery of a three-fourth interest in lands described in their petition.

Their father, the late T. S. Crawford, resided in Caldwell parish, and left a wife and four children, minors at the date of his death.

Their mother qualified as their tutrix and shortly afterward removed to Texas, and married, in 1878, one J. P. McGuire, from whom she obtained a divorce in 1878.

In 1880 the tutrix visited relatives in Madison parish, and while in that parish on a visit, a family meeting was held and recommended her appointment as tutrix without bond. The tutrix qualified, also an under-tutor.

The tutrix never resided in that parish and owned no property situate within its limits.

On the 15th day of December, 1882, one of the heirs, Mary Risinger, joined by her husband to authorize her, brought suit in the District Court of Richland parish to partition a plantation containing four hundred and ten acres, the property of the late T. S. Crawford.

In her petition for the partition she alleged the interest she claims and the interests of her mother and co-heirs. She averred that they were absentees; also that it was necessary to appoint a curator *ad hoc* to represent her mother and her mother's husband, individually and as tutrix and co-tutor of the absentee; also to represent each of the minors.

The prayer of the petition is that a curator *ad hoc* be appointed to represent Mrs. Alice A. McGuire and her husband, individually and as co-tutor. The minors are not personally named nor referred to as absentees to be represented.

Upon consideration of the petition the clerk of the District Court issued an order appointing an attorney at law to represent the parties, including the minors personally.

The court subsequently pronounced a judgment of partition, decreeing a sale of the plantation to effect a partition upon terms to be fixed by a family meeting, and ordering that a family meeting be held to recommend the terms.

In March, 1884, the property, under this judgment, was offered for sale, and adjudicated to John A. Hernler, the warrantor.

On the 27th November, 1888, Hernler sold the property to R. L. Binion.

The records do not contain a copy of proceedings of any family meeting in the interest of the minors to fix the terms of the partition sale, as decreed in the judgment for a partition.

This is urged as one of plaintiff's grounds to annul the proceedings of partition; the plaintiffs also aver that the defendants in the suit for partition, plaintiffs in the present suit, were minors and not represented in the proceedings; that their mother had lost her natural tutorship by her second marriage, and that the appointment of a curator *ad hoc* to represent their mother personally and as tutrix, and appointing the same curator to represent each of the minors, who had conflicting interests, was an absolute nullity; that the curator *ad hoc* never was cited and never answered; that the court of Richland parish was without jurisdiction to settle the succession of T. S. Crawford, whose last place of domicile was the parish of Caldwell, where his succession was opened.

The plaintiffs claim rent at the rate of four hundred dollars per annum, and that the defendant and warrantor were in bad faith.

JURISDICTION IN PARTITION.

Primarily the inquiry suggests itself, was the court of Franklin parish vested with jurisdiction?

The property was owned in indivision. No administrator nor executor opposed the application to make a partition at the *situs* of the property. It does not appear that there were debts or that there was the least necessity of establishing a *residuum* of interest owned by the heirs.

The property was owned by the surviving widow and the heirs, who were parties to the proceedings. This being the condition, the court had jurisdiction; not an exclusive jurisdiction, for the court of the domicile may issue similar orders and pronounce similar decrees in the course of the settlement of the succession.

The jurisdiction of the court of the domicile does not necessarily exclude the jurisdiction of the court of the *situs* of the property. Co-heirs made defendants who are cited to appear before the court where the property is situated, and make no defence, but submit themselves to the court's jurisdiction by offering no defence, can not be heard to question the validity of the title of the purchaser at the partition sale who bought it in good faith.

The property was not owned exclusively by the succession. The

Crawford et al. vs. Binion.

surviving widow had an interest in the land. *Buddecke vs. Buddecke*, 31 An. 572.

APPOINTMENT OF CURATOR AD HOC TO REPRESENT MINORS.

It is argued for plaintiff that the defendants in the partition proceedings were absentees, and that they were not legally made parties to the suit; that they were not cited.

To sustain the arguments they allege that the appointment of the curator *ad hoc* was an absolute nullity in that it was *ultra petitem*; that the petition did not make them parties individually, nor as absentees, but simply as minors represented by one who was no longer tutrix.

In the body of the petition it is asserted that an appointment should be made to represent the minors personally. The omission in the prayer is cured by the order appointing the curator *ad hoc*. The officer sets forth in the order of appointment that after having considered the petition he made the appointment of the curator *ad hoc* to represent the minors personally, as well as their tutrix.

The plaintiffs themselves did not consider it a fatal irregularity, for in their petition in this case they allege:

"4. The appointment of a curator *ad hoc* to represent Mrs. A. McGuire individually and as tutrix, and appointing the same curator to represent each of the minors who had conflicting interests, was and is an absolute nullity."

In the face of this allegation, the objection urged in argument only, that the prayer does not include the minors personally, has no merit.

THE MINORS PROPERLY REPRESENTED.

This brings us to the second point presented in plaintiff's petition to annul the petition, that the minors who had conflicting interests could not be represented by one curator; that each absent minor must be represented by a curator *ad hoc*.

The law's provision upon the subject is, that the several minors who have opposite interests in the partition, and who have the same tutor, "there shall be appointed to each of them a special tutor *ad hoc* whose functions shall cease after the partition has been effected." C. C. 1369.

The sale made to effect a partition is merely one of the acts of the partition. *Hooke vs. Hooke*, 14 L. 23.

In establishing the shares of the minors in the partition who have opposite interests, special tutors must be appointed also in forming lots in a partition in kind, for in forming these lots the minor absolutely parts with an interest and becomes the absolute owner of the interest allotted to him.

The necessity of such an appointment does not arise in the matter of the sale of the property to effect the partition.

The rights of the defendants *inter se* remained as if no sale had been made. Their rights attach to the proceeds. In definitely settling those rights, a conflict of interest may arise rendering it necessary to appoint a special tutor to each minor.

The proceedings to sell do not suggest the necessity of appointing a different curator *ad hoc* to represent each party in interest.

The functions of the curator are not of such a character as require such separate representation at the sale.

In Succession of Pinniger, 25 An. 55, a similar question was considered, and the court in that case announced that the fact that there were not special tutors *ad hoc* appointed for the minors at the sale did not concern the purchaser; that the duty of such tutors begins at the partition before the notary, and if not appointed at the time of the sale they may be appointed afterward, before the notary begins the partition.

In *Emnor vs. Kelly*, 23 An. 764, the court said: "In the ulterior proceedings—that is, after the sale—especially in the act making the partition, separate tutors were severally appointed by the minors."

In the Rev. Civil Code the article requiring such appointments—viz., Art. 1369—is found under the *rubriques*: “How the notary is bound to proceed in judicial partition,” and relates more particularly to the forming of lots and the method to be followed in the partition proper.

The plaintiffs also plead, as a ground to annul the sale, that the curator *ad hoc* was never cited and did not file an answer.

The plaintiffs on the trial "admitted that the original \$41, Mrs. M. E. Risinger vs. Mrs. A. A. McGuire et al., has or mislaid, after diligent search, except the original appropriation made by the ... M. C. Williams ... ment being one ... dollars to ... tion; except ... directed

Crawford et al. vs. Binion.

of the parish of Richland, giving the terms of the sale as agreed to by a family meeting."

We are not informed whether or no a citation was among the lost documents.

The minutes show that "in this case there was an answer filed."

The documents being lost, this extract from the minutes supplies the loss, as it shows that an appearance was made on behalf of the defendants in the partition proceedings.

Granted that the tutrix had forfeited her trust as tutrix by permanently leaving the State, her minor children, who were with her and absentees, were represented by a curator *ad hoc*.

"If the minor against whom one intends to institute a suit has no tutor, the plaintiff must demand that a curator *ad hoc* be named to defend the suit." Art. 116, C. P.

Interpreting that article in Buddecke vs. Buddecke, 31 An. 574, this court held that "the minors, being absentees, were properly represented by curators *ad hoc*."

In Zuberbier vs. Prudhomme, 34 An. 1048: Minors may be made parties through a curator *ad hoc*.

The plaintiffs also allege that "no family meeting was ever held in the interest of said minors to fix the terms of said partition sale."

In the admission made relative to lost documents, the record discloses that there is an order of sale extant giving the terms of the sale *as agreed to by a family meeting*.

Whatever may have been the informalities and irregularities of the meeting are not before us; only the admission is of record. There may have been grave irregularities, but the admission made to supply lost records is an answer to the allegation that no such meeting was held fixing the terms of the sale.

Moreover, in an action of partition against minors the terms need not be fixed by a family meeting. C. C. 1237.

In Shaffet vs. Jackson, 14 An. 157, it was decided that "where minors are sued for a partition a family meeting is not necessary to authorize the suit, or to fix the terms of the sale."

THE INNOCENT PURCHASER.

As to strangers, there is no good reason to hold them bound because of informality, however great, or because no family meeting at all was held.

Crawford et al. vs. Binlon.

The principle is now well established that a probate sale to effect a partition is a judicial sale, and the purchaser is protected by the decree, beyond which, if the court have jurisdiction, he need not look. *Lalanne's Heirs vs. Moreau*, 13 La. 431.

"The order of sale, it has been held, is a judgment, and that the purchasers under it are protected." *Graham Heirs vs. Gibson*, 14 La. 150; *Shaffet vs. Jackson*, 14 An. 155.

The court, we have determined, had jurisdiction, and the heirs were parties to the proceedings.

The irregularities are not jurisdictional, and the rights of strangers to the proceedings resulting in a sale are not affected by them.

CLERICAL ERROR.

We note that in the brief it is stated that the judgment in the partition suit is fatally defective in another respect.

That it does not mention two of the plaintiffs.

It is not made a ground in plaintiff's petition. We do not feel at liberty to annul a partition upon a ground not judicially alleged. The District Judge says it was a clerical error.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed at appellant's costs.

APPLICATION FOR A REHEARING.

WATKINS, J. The point is made that "two important questions were not noticed by the court:" (1) that the judgment ordering the partition did not *fix the shares* of the co-proprietors; (2) that the property was the *separate* estate of plaintiff's father, and not that held in community between him and his wife.

This proposition is coupled with the averment that the judge *a quo* improperly refused plaintiffs a new trial on the ground assigned of newly discovered evidence to the effect that Crawford *entered* the land in controversy prior to his marriage; and the contention of their counsel is that if they are not allowed a new trial, for the purpose of introducing the evidence newly discovered, the evidence should be considered in determining the *status* of the property.

On this hypothesis the argument and insistence of plaintiff's counsel is that—taking the property to be *separate* and not community—the judgment of the court *a quo* must be reversed and the partition sale declared an absolute nullity. For, say they, if the surviving

Crawford et al. vs. Binion.

Mrs. Crawford had no community half-interest in the property, there was a one-half interest in the property that was not represented in the partition suit and sale. That this question is jurisdictional, and the fact a fundamental, radical defect, because a judgment against an absentee can have no effect beyond the property interest of the absentee, which is before the court rendering the decree—the court possessing no jurisdiction *in personam quoad hoc*.

While still insisting on *all* the grounds assigned in the petition for the nullity of the partition suit and sale, there have not been any *specific* reasons assigned for a rehearing in other respects than those enumerated; and we are not, for that reason, authorized to review them.

I.

On the first proposition, that the judgment of partition did not *fix* the shares of the respective co-proprietors, we find the statement of our opinion to be, that "the court pronounced a judgment of partition decreeing the sale of plantation to effect a partition upon terms *to be fixed* by a family meeting, and ordering that a family meeting be held to recommend the terms;" and, in treating of the nullity of the appointment of a curator *ad hoc* to represent the absentee defendants in the suit, the opinion draws a clear distinction between the proceedings *antecedent to the act of partition* and the proceedings *in the matter of the partition*; and held that one curator *ad hoc* was sufficient to represent all the defendants in the former, but that "in *establishing the shares of the minors in the partition* who had opposite interests, special tutors must be appointed; also in forming lots in a partition in kind—for in forming the lots the minors absolutely part with an interest and become the owners of an interest."

The conclusion is clear and irresistible that there is a marked distinction between the essential requisites of a partition suit and the proceedings in effectuating a partition, under the judgment ordering a partition. Recognizing this clear distinction, the judgment *did not fix the shares of the heirs*; and this is the effect of our opinion. In fact, this is the only basis of it.

II.

On the second proposition our opinion simply states, without any discussion, "that the property was owned in indivision," without specifying it as separate or community property.

State vs. Tyler.

An inspection of the record discloses no record proof as to the *date* or *dates* at which the deceased, T. S. Crawford, acquired the property in dispute, except of one tract of eighty acres, which was adjudicated to him at sheriff's sale on the 1st of April, 1854; and, inasmuch as his marriage occurred on the 28th of December, 1854, it was evidently not an asset of the Crawford community.

With regard to the remaining three hundred and thirty acres there is no proof, except that furnished by the evidence of the widow Crawford, that her deceased husband had purchased *all* of the lands and made all of the improvements thereon prior to their marriage. The judge *a quo* did not regard that testimony sufficient to justify the annulment of the defendant's title, derived, as it was, through a judicial partition of the property, proceedings in which had been taken on the theory that same was community. As there is only one-half interest in eighty acres affected by this ground of complaint, we are of opinion that the rule *de minimis* should apply—it being only ten per centum of the total amount of land claimed. We think his decision was correct.

III.

After judgment had been rendered against them, plaintiffs made an unavailing application for a new trial in order to introduce in evidence a certified abstract of land entries found in the recorder's office, parish of Richland, showing that T. S. Crawford did enter the remaining three hundred and thirty acres of land on July 31, 1854, and September 21, 1854, respectively, to show his separate ownership. Their motion was formal, timely, and adequate in terms; but it is manifest that it does not evidence due diligence. The evidence was important, but it was as easily obtainable *before* trial as it was *afterwards*. Its rejection was not error on the part of the judge.

Rehearing refused.

No. 1299.

THE STATE VS. BILL TYLER.

The error assigned in the indictment under Sec. 790 of the Revised Statutes for stabbing with intent to murder while lying in wait, or in the perpetration or attempt to perpetrate a robbery, etc., that the essentials of the robbery are not set out, will not be sustained when rejecting as surplusage all words relating to robbery, and the perpetration or attempt to perpetrate that crime, there is the complete offence charged of lying in wait and stabbing with intent to commit murder. R. S., Sec. 790; 21 An. 748; State vs. Humphries, 35 An. 966.

State vs. Tyler.

The summoning of the witnesses who testified on the preliminary examination of the accused and the returns of the sheriff *not found*, unless it is made to appear the witnesses are in fact within reach of the process of the court, is sufficient to authorize the introduction of their testimony on the examination. R. S. 1010.

A PPEAL from the Twentieth District Court, Parish of Ascension.
Guion, J.

R. McCulloh for Defendant and Appellant.

J. P. Madison, District Attorney, for the State, Appellee.

The opinion of the court was delivered by

MILLER, J. This appeal is from the sentence of the lower court on defendant of imprisonment for life on his conviction for lying in wait and cutting with a dangerous weapon, with intent to commit murder, the persons named in the indictment.

There was a motion to quash the indictment for irregularities in drawing the jury, the same as are alleged in the case of *State vs. White*, 46 An. 1273, decided at this term, and for the reasons given in the decision in that case our conclusion is there is no merit in the motion.

There is a bill of exceptions to the admissibility of the testimony on the preliminary examination; the objection being that there was not sufficient diligence to obtain the presence of the witnesses on that examination at the trial. Under the statute the witnesses should be produced when their attendance can be secured. R. S., Sec. 1010. We find that the witnesses were summoned, and there is the return of the sheriff that they could not be found. There is, besides, his testimony of fruitless inquiries made by him for the witnesses. In the course of the examination of the witnesses, one testified he had heard the absent witnesses state, when before the committing magistrate, that they were non-residents. The defendant took a bill of exceptions to the testimony of the statements of the absent witnesses. Without the testimony of their statements, we think the State exhibited due diligence to obtain their presence, and a foundation was thus laid for the introduction of their depositions on the preliminary examinations. It can not be expected the State should send its sub-

Marx vs. Creditors.

pœnas into other parishes with no reasonable cause to suppose the absent witnesses could be found. Subpœnas were issued and the witnesses were sought in Ascension, and the sheriff's efforts extended to the adjoining parish, Assumption, and all was done that could be reasonably demanded in the premises.

The assignment of error is: that the indictment under Sec. 790 of the Revised Statutes is defective, because charging attempting to perpetrate and perpetrating a robbery, and cutting with intent to murder; the ingredients of robbery and murder and the particulars of their crimes are not stated. But the disjunctive in the section makes the crime complete without the perpetration or attempt to perpetrate the robbery. So any supposed defect in respect to describing the robbery may be rejected as surplusage, and there remains the offence of lying in wait and cutting Albert Lincoln and Michael Cooney with a dangerous weapon with intent then and there feloniously, wilfully and of malice aforethought to kill and murder said Albert Lincoln and Michael Cooney. The conviction stands for this offence, sufficiently charged.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

No. 1287.

JACOB MARX VS. HIS CREDITORS.

Under the Act No. 134 of July 12, 1888, the creditor seeking to set aside the respite granted his debtor must prove his failure to make the payments required by the respite, and such proof is not dispensed with because the debtor ruled to show cause why the respite should not be set aside fails to show cause or files a frivolous exception.

A PPEAL from the Third District Court, Parish of Union.
Barksdale, J.

Gunby & Sholars for Plaintiff and Appellant.

Everett & Thomas for Defendants and Appellees.

The opinion of the court was delivered by
MILLER, J. The plaintiff, Jacob Marx, obtained a respite from his

Marx vs. Creditors.

creditors. Subsequently, some of his creditors instituted proceedings by rule to set aside the respite on the ground that the debtor had not made the payments under the terms of the respite, and other grounds were assigned. To this rule the debtor excepted and the exceptions were overruled. Thereupon the court, without any proof of the allegations in the rule of the creditors, made the rule absolute, annulling the respite and appointing a syndic to administer the debtor's property, the court conceiving the debtor called on by the rule to show cause and having shown no cause against annulling the respite, that the judgment making the rule absolute was authorized without any proof of the creditors' demand. From that judgment the debtor appeals.

The Act No. 134 of 1888 is the basis of the demand of the creditors. That act provides that the creditors of the respited debtor shall have the right to cause the respite to be set aside and a syndic appointed, if the debtor fails to comply with the terms of the respite. The proceeding under the act is to be summary. We are asked in this case to hold that the act, besides providing a summary proceeding, dispenses the creditor from making any proof of the default of the respited debtor, on which default the right of the creditor to the relief sought by him depends. All will concede the general rule that the plaintiff, whether in the suit or in rule, must prove his demand. When the appeal comes to this court the record must exhibit the testimony, or the statement of facts, or admissions on which the judgment rests. C. P. Arts. 585, 586, 603.

The judgment in this case rests on no basis, except the rule against the debtor to show cause why judgment should not be pronounced against him and his failure to show cause. The creditors, plain iffs in rule, were not in our view dispensed from the burden of proving the allegations of their rule merely and only because the debtor did not exhibit cause. The burden was not upon him to show the creditors had no ground, but on the creditors to show the grounds existed on which they relied. The defendant in the suit who fails to appear when cited, or files a frivolous exception, which is overruled, is not therefore presumed to admit plaintiff's demand. The plaintiff in the ordinary suit, notwithstanding the failure to answer or the frivolous exception of the defendant, must still prove his demand. So it is with the plaintiff in rule, that is, although the defendant in the rule does not show cause, or at least any adequate case, still the plaintiff in the rule must prove his demand.

 State vs. White.

It is urged on us that rules to erase mortgages and against garnishees are made absolute without proof. Such rules taken by administrators or syndics in the course of their administrations before the court having jurisdiction of the succession or insolvency, are made absolute because the law directs such erasure as the incident of such administration. Judgments go against garnishees because the legal consequence of the mere lapse of ten days without answer. But proceedings to erase mortgages or against garnishees furnish no warrant for a judgment annulling a respite without any proof of the facts on which, under the act of 1888, the right to annul depends. It deserves consideration, too, that respites concern all the creditors of the debtor. On the theory that respites may be set aside without any proof of the default of the debtor, the rights of all the creditors could be displaced or affected by the collusion of the debtor with any one of his creditors, not to show cause when proceeded against to annul the respite. We think the consequence itself illustrates the fallacy of the argument in support of the judgment.

The presumption in some cases is invoked that judgments are based on testimony. But any such presumption is excluded by the showing on the record that no testimony was produced.

The manifest justice of the case, and the fact that the lower court conceived the act of 1888 authorized the judgment without proof, determines us to remand the case to enable the creditors to make that proof.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed and the case be remanded to the lower court for proceedings in conformity to this opinion, the costs to be paid by the appellee.

 No. 1298.

THE STATE VS. CHARLES WHITE.

The venire of jurors will not be set aside and the indictment quashed merely because one of the commissioners wrote the names of the jurors on a portion of the ballots in the jury box, or because there is a number on the ballots manifestly intended to designate the ward of the residence of the juror, it appearing the names were so written by one of the commissioners in the presence of his co-commissioners and clerk; and although the clerk is required by the act to write the names, and although the act requires the ballot should express the residence as well as the names of the jurors; the irregularities indicated being within the provisions of the act maintaining the venire and indictment, unless it is shown the irregularities caused great wrong to the accused. Act No. 44 of 1877.

46	1273
46	1270
46	1273
51	1089
46	1273
115	948

State vs. White.

No foundation for the introduction of the testimony on the preliminary examination of the accused is required, other than that afforded by the certificate of the committing magistrate, save when it is claimed the witnesses are within reach of process and should be produced, then diligence to obtain their presence is an issue. R. S., Sec. 1010.

It is presumable that ballots in the jury box bear names of jurors written by clerks of the District Court who have passed out of office, and the testimony of the incumbent clerk, on the motion to quash the venire, that he did not recognize the handwriting on three of the ballots drawn from the box, does not authorize the conclusion that others than the clerk wrote the names on the ballots so drawn, but the inference is the names were written by the predecessors, or some of them, of the incumbent clerk, and of whose handwriting he had no knowledge. Acts 1877, No. 44.

A PPEAL from the Twentieth District Court, Parish of Ascension.
Guion, J.

J. P. Madison, District Attorney, for the State, Appellee.

G. A. Gondran and *R. McCulloh* for Defendant and Appellant.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the sentence of ten years imprisonment for manslaughter.

It is urged the court erred in overruling the motion to quash the indictment. The grounds of the motion to quash were that the ballots or slips of paper were not written by the clerk, and did not contain the number of the ward or place of residence of the jurors. The testimony is that the names of three of the jurors on the ballots drawn from the box to form the petit jury were in handwriting not known to the clerk of the court, and from this the conclusion is deduced that the ballots were not written by the clerk as urged in the motion to quash. A portion of the ballots were written by one of the commissioners, but in the presence of the clerk and the other commissioners. It further appears that the ballots have only the name of the juror and a number, and this is the basis of the objection that the residence of the juror is not on the ballot as the law requires.

Under the law three hundred ballots bearing the names of jurors were required to be put in the jury box at the outset, and the box is to be replenished from time to time, so that the standard of three hundred

names shall at all times be maintained. It is a fair inference that the box contains ballots bearing names written by the clerks, or at least some of them, who have at different periods filled the office, the duty of writing the names being imposed on the clerk as one of the jury commissioners. Act No. 44 of 1877.

The presumption that the ballots were placed in the box and the names written on them by the clerk is not at all displaced by the testimony of the present clerk of his want of knowledge of the handwriting on three of the ballots. The inference is authorized the handwriting was one of his predecessors in office.

The number on the ballot could have been placed upon it for no other purpose than to indicate the ward of the juror's residence. Of course it would have been better to add word "ward," but still the significance of the number is, that residence is intended, so as to meet the requisite of the law that the ballot shall bear the residence as well as name of the juror.

When we are asked to quash this indictment on the ground that others than the clerk wrote the names on the ballots, the answer is, there is no proof to sustain that ground. To call on this court to quash the indictment because the ballots bearing numbers, manifestly referring to the jurors' residence, do not contain the word "ward," is to insist, we think, on an exactitude as to details not ordinarily attainable or to be expected. The law directs the clerk shall write the names. In this case some were written by one of the commissioners, but in the presence of his co-commissioners and of the clerk. This was a deviation from the law. But the law has wisely provided that no venire of jurors shall be set aside and indictments quashed for any irregularity in drawing juries, unless it appears that some great wrong or injury has resulted to the prisoner. No such wrong is suggested in this case, and we think this saving provision in the jury law is in itself a sufficient answer to the objection the ballots were not written by the clerk and did not express the jurors' residence. The decision cited by the prisoner's counsel from 29 An. 825; 43 An. 1131; 35 An. 350, maintains the nullity of venires drawn without the presence of the clerk, clothed as he is with important functions in the jury drawings; they also hold that the assumption by strangers of the functions of jury commissioners, vitiates the venire. We can not appreciate the application of those decisions to this case.

State ex rel. Reynolds & Henry Construction Co. vs. Mayor and Council.

The last point urged against the verdict is that the lower court erred in admitting in evidence the testimony of witnesses on the preliminary examination. The objection is: no foundation was laid for the introduction of the testimony. It is urged in the brief that the preliminary examinations were not attested by the magistrate. The bill of exceptions does not show that objection. The bill states "the papers were not in proper shape." That objection is too vague. We must conclude the preliminary examinations were properly certified and the depositions reduced to writing by the trial judge. No foundation was requisite to be laid other than that afforded by the papers themselves. R. S., Sec. 1010.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

No. 1801.

**THE STATE EX REL. REYNOLDS & HENRY CONSTRUCTION COMPANY
VS. THE MAYOR AND COUNCIL OF MONROE.**

The promulgation of the returns of election of the votes of tax-payers to determine whether a tax is to be imposed in aid of railroad enterprises, is a ministerial duty, obedience to which will be compelled by mandamus. The officials charged with the duty, when called on to make promulgation of the result, can raise no question of fraudulent voting or other objection to the validity of the tax; nor have such officials any discretion or power to withhold or refuse that promulgation. Act No. 35 of 1896; High on Extraordinary Remedies, 6 An. 66; 11 An. 672; 14 An. 249, *passim*. See decision between these parties in 45 An. 1024.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Boatner & Lamkin for Relators and Appellants.

Thomas O. Benton, City Attorney, for Respondent and Appellee.

The opinion of the court was delivered by

MILLER, J. This is an application for a *mandamus* to compel the defendants, the Mayor and Council of Monroe, to promulgate the result of an election held in Monroe on the 10th of April, 1888, to determine whether a tax should be levied in aid of the construction

46 1276
47 1290
48 1276
49 1043
46 1276
50 124

HARVARD LAW LIBRARY

State ex rel. Reynolds & Henry Construction Co. vs. Mayor and Council.

of the Houston, Central Arkansas & Northern Railroad Company, the relators acquiring by assignment from the railroad company the right to such taxes.

The defendants resist the application on various grounds: that no demand has been made for the promulgation and there has been no refusal of promulgation; that relators had not used due diligence to secure the returns, and their demand is stale; that more than five years have elapsed since the election during which the relators have had it in their power to compel the commissioners of the election to make their return; that no returns have been made and all data of the election, except as shown, has been lost, and the fault of the relators is charged to have been the cause the law was not complied with; that it is beyond defendants' power to comply with the *mandamus*; that they never had possession of the returns. The answer further assails the election itself, and the returns claimed to have been filed with the clerk of the court as false and fraudulent, the fraud in respect to the election being in the alleged fraudulent votes cast, and the answer asserts a discretionary power in the Council in respect to promulgating the returns, of which discretion it is charged the issue of the writ would deprive defendants.

The Act No. 35 of 1886 provides for elections to determine the question of taxing the property of cities, towns and parishes in aid of railway enterprises. Constitution, Art. 242. If such tax is approved by a majority of the tax-payers at the election to be conducted in accordance with the general election law, the act makes it the duty of the municipal authorities of the town, city or parish to levy the tax. Act, Secs. 1, 2, 3, 4. This court, in its previous opinion between these parties, held that the preliminary step to claiming the imposition of the tax was to obtain the promulgation of the returns, and reserved the relators' rights to compel that promulgation.

We gather from the brief and argument of defendants that the discretionary power, asserted for them in respect to the election under consideration, relates to fraudulent votes claimed to have been cast, for reference is made in the brief to defendant's efforts in the lower court to show fraudulent and illegal voting, and it is claimed that this discretion also exists in the council to determine whether there shall be any promulgation at all. This theory of a discretionary power runs through the entire defence in this court. We are at a

State ex rel. Reynolds & Henry Construction Co. vs. Mayor and Council.

loss to conceive whence it is derived. If it exists, the power to vote the tax which the Constitution and legislation vests in the property tax-payer, is controlled by the discretion of the municipal authorities, to be exerted after the votes of the tax-payers have been cast. The power claimed for the municipal authorities assumes they shall determine whether illegal votes have been cast, and for this cause, or because they deem the returns illegal, they shall have the discretion to make no promulgation of the result and refuse to give effect to the election. In our view no such power exists in the Council and Mayor. Their functions in all respects are ministerial, save that they must ascertain if the petition of the tax-payers is signed by the requisite number prescribed by the first section of the act, and their determination on this point is, of course, subject to judicial control. On the presentation of the petition, properly signed, the election must be ordered and the result proclaimed. If in favor of the tax, it must be levied and applied as directed by the act. From first to last the writ of *mandamus* is available to any and all parties in interest to compel obedience to duties purely ministerial. High on Extraordinary Remedies.

If frauds are committed in the election of a character to vitiate the tax, or other causes exist to oppose it, the remedy is not to be sought in any discretion of the Council. Instances are not infrequent of taxes of this character being resisted, nor has there been the least difficulty in finding suitable remedies where there is ground for their application, but remedy and relief is not by the refusal of the municipal authorities to perform ministerial acts. There is, in our view, no place in this discussion for questions of fraudulent voting, or other defences intimated against the tax itself. Such issues can have no determination to bind anybody on the mere issue whether the result of an election shall be announced by those charged with the duty. Hence, while we have given due attention to all these defences, we are clear they are foreign to the issue here and need no other comment.

On the issue that the defendant can not perform the duty, we must be controlled by the proof and the nature of the duty to be performed. It is, as we appreciate the testimony, proved that the returning officer handed the returns of the election to the secretary and treasurer of the Common Council at the meeting of the Council itself. Copy of the returns doubtless can be found in the proper

State ex rel. Reynolds & Henry Construction Co. vs. Mayor and Council.

custody. The previous litigation has been conducted on no such ground as inability to make the returns, and the present defence on that ground is hardly consistent with the other positions assumed by defendants.

As to the lapse of time no prescription has accrued, nor are defendants in any position to urge delays imputable to them alone.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that the writ of *mandamus* issue as prayed for in the petition of relator, and that defendants pay costs.

Rehearing refused.

HARVARD LAW LIBRARY

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT OPELOUSAS,

IN

JULY, 1894.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. LYNN B. WATKINS, *HON. SAMUEL D. MCENERY, HON. JOSEPH A. BREAUX, HON. HENRY C. MILLER.	}	<i>Associate Justices.</i>
--	---	----------------------------

*Absent this term.

No. 1460.

HARRY B. HEWES ET ALS. VS. JOHN P. BAXTER ET AL.

1. Where the wife of one of three joint owners of property dies, leaving a will in which she admits that the interest in that property standing in her name belongs to the community of acquets and gains, there is no necessity, in a suit brought by the other joint owners to effect a partition, that the surviving husband should be made a party in his capacity as testamentary executor of his wife as well as personally and as tutor of his minor children, the wife's half of the property being left exclusively to the children,
2. Where the community is dissolved by the death of the wife her testamentary executor has not the right to take possession and control of the property of the community on the ground that the settlement and liquidation of the community is to be conducted in the wife's succession by and through the administration of the executor.

46	1281
46	1286
46	1288
46	1281
47	128
46	1281
48	721
49	1740
46	1281
50	567
46	1281
52	1175
46	1281
125	190

A PPEAL from the Nineteenth Judicial District Court, Parish of Iberia. *Voorhies, J.*

Hewes et als. vs. Baxter et al.

L. T. Dulany and Foster & Broussard Attorneys for Plaintiffs and Appellees.

Philip H. Mentz and Walter J. Burke Attorneys for Defendants and Appellants.

The opinion of the court was delivered by

NICHOLLS, C. J. This is the second time that this case has come before us on appeal. In the July term of 1893 we reversed the judgment which had been pronounced in the District Court and remanded the cause for further proceedings according to law without prejudice to the rights of any one, and with leave granted to all parties to so reform their pleadings and proceedings as to conform to the law and the views expressed in our opinion. The case will be found reported in the 45th Annual 1049, where the facts and pleadings are stated at length.

At the same term, we made a similar disposition of a second suit between the same parties, which had been instituted in and gone to judgment in the parish of St. Martin, 45 An. 1065. The two suits sought a partition between joint owners of certain property, part of which was situated in the parish of Iberia and part in the parish of St. Martin. The suits were brought in different parishes by reason of this fact. In the pleadings in those cases it was alleged that the property to be partitioned had been acquired by a partnership known as Milmo, Stokoe & Co., composed of Mrs. Mattie J. Stokoe, wife of J. W. Stokoe, Bernard B. Milmo and Harry B. Hewes. That the partnership had become dissolved by the death of Mrs. Mattie J. Stokoe and Bernard B. Milmo; that Milmo had left as his heirs several minor children, and that J. P. Baxter had been appointed and qualified as tutor of these children and as executor of their father's estate. That Mrs. Stokoe had left as her heirs two children, one by a former marriage, who had been relieved from the disabilities of minority by judgment of court (Rose Mary Leitch), and one a minor, to whom his father (J. W. Stokoe) had been confirmed and qualified as tutor. That Mrs. Stokoe had left a last will and testament in and by which her husband, J. W. Stokoe, was appointed executor and that he had qualified as such.

The plaintiffs in each of the two suits were Harry B. Hewes, one of the former partners, and Rose Mary Leitch and J. W. Stokoe,

personally, and as tutor of his minor son, Neil W. Stokoe, as representing the interest formerly apparently held by Mattie J. Stokoe. The defendants were the succession and minor children of Milmo, represented by Baxter, as tutor and executor. The judgments in both cases ordered a sale of the property described in plaintiff's petition in order to effect the partition. The judgments were reversed by us for the reason, that it appeared from the record that the law had not been complied with in the matter of the tutorship of the minor, Neil W. Stokoe, in that prior to the appointment of a tutor, no recording had been made of the minor's property, so as to secure a mortgage in his favor for the acts of the tutorship. We held that the District Judge should have sustained the exception taken by defendant to the right of J. W. Stokoe, as tutor, to represent the minor Neil W. Stokoe, and to stand in judgment for him therein and that he should have dismissed the said Stokoe, a co-plaintiff representing the said minor as tutor.

On the return of the cases, Stokoe was appointed and duly qualified as tutor, and letters issued to him as such. Having been authorized by a family meeting, whose recommendations to that effect were homologated, to institute, on behalf of the minor, proceedings for the partition of the property hereinbefore referred to, he, with the leave of the court, intervened in the pending proceedings, joining Hewes as a co-plaintiff, and asking a judgment against the defendants. One of the minor heirs, Milmo, having reached the age of majority, was made a defendant. After several exceptions taken and overruled, the defendants answered and the case went to trial, resulting in a judgment in favor of the plaintiffs and intervenors and against the defendants, and decreeing a sale of the property to effect a partition among the joint owners. Defendants have appealed. The case was submitted to us on briefs. The objections urged are two. The first is that urged in the answer, in which defendants declare that they "deny that John W. Stokoe has any right or title to any part of the property named in the petition; that the succession of the wife has ever been settled, but is still under administration, and that he has possession of said property only as executor; that legatees are named in the will, and Stokoe has never filed account of his gestion and the property has never been distributed among the heirs and legatees as directed."

This position is thus alluded to in defendant's brief: "J. W. Stokoe

Hewes et als. vs. Baxter et al.

was appointed and qualified as the executor of the last will and testament of his deceased wife, Mrs. Mattie J. Stokoe. Save that he did qualify, he has never performed a single act in his capacity as executor; he has never filed an account or asked for an order or provoked a judgment of any kind. The will declares that the property left by the decedent is community property, so that one-half, after due administration, belonged to the husband; the other half of such RESIDUUM would be the property of Neil W. Stokoe, a minor, and of Rose Leitch, an emancipated minor, the child of the deceased by a previous marriage. These suits were brought by J. W. Stokoe in his own name, as owner of half the property left by his wife, and as tutor to the minor owning one-fourth. After the suit in the parish of Iberia was decided, and before the last trial, in the parish of St. Martin, but long after that suit had been remanded by this Honorable Court, these parties applied to have themselves put into possession of the estate of Mrs. Mattie J. Stokoe, and the usual order was rendered by the District Court upon that petition. Still the executor has never filed an account or performed a single act as executor; nor is there any evidence to show that there has been a gestion of any kind. In short, the act by which the executor sought to have himself put in possession was an abandonment of his trust, without the performance of a single duty which this trust imposed upon him. But the palpable fact is the absence of having accounted, as executor, to the court for the property which passed into his hands, or of being discharged by the court from this trust."

We understand defendant to call in question the right of the children and heirs of Mattie Stokoe and the right of J. W. Stokoe to stand in judgment on partition proceedings, so long as the estate of Mrs. Stokoe is in charge of an executor. Waiving any discussion of what would have been the force of such a contention had this property belonged in its entirety to the succession of Mrs. Mattie J. Stokoe, or had not belonged to the community between herself and husband, we think it clear it has no weight under the actual facts of the case. We may here say that the only legacy left by the deceased was certain furniture to Rose Mary Leitch, who is herself, in proper person, one of the plaintiffs in this suit.

Defendant's theory that when the community of acquets and gains is dissolved by the death of a wife, and her succession has been opened and a testamentary executor appointed thereto, that the

community property passes into the possession of and under the control of this executor, and the community has to be settled and liquidated in the wife's succession by and through an administration of the executor, is not correct. All parties interested in the community of acquets and gains which existed between Stokoe and his wife, are before the court and would be bound by the proceedings herein. There is another feature in the case which should be referred to, and that is the fact, that the suit as brought was brought not only by Stokoe personally, and as tutor and Rose Mary Leitch, but also by Hewes, one of the partners. The right of the latter to institute a partition suit against the other joint owners, was not dependent upon the condition of the succession of Mrs. Mattie J. Stokoe. Instead of directing the proceedings against all the other joint owners and their representatives as defendants, he was joined by Stokoe personally, and as tutor of Neil W. Stokoe and Miss Leitch as co-plaintiffs, the views of these parties in relation to their respective interests being, it seems, in accord. When upon ascertaining that Stokoe, though he had been appointed tutor and had taken an oath as such, had never caused an abstract of the inventory of the minor's property to be recorded, we annulled the judgment for a sale of the property and a partition among the parties in interest. We did not dismiss the suit, but remanded the cause for further proceedings, the principal object of such remanding being to afford an opportunity to bring the minor regularly before the court as a party. It was not necessary under the circumstances of this case that the testamentary executor of Mrs. Stokoe should be made a party. We are not advised of there being creditors of her separate estate, but if such there be there are ample remedies by which they can protect themselves.

The second objection urged to the judgment of the District Court, is as to the mode in which the partition should be made. Defendants contend that it should be made in kind; the other parties interested, that it should be made by licitation. The court on the evidence adduced adopted the views taken by the appellees, and ordered a sale of the property to effect a partition. We have examined the testimony and we can not say there is any error in the judgment in this respect. It is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

Hewes et al. vs. Baxter, Tutor and Executor, et al.

ON APPLICATION FOR REHEARING.

In the judgment rendered by us in this case we simply affirmed the judgment appealed from. While the litigants raised several issues on appeal, no allusion was made by either side as to any error in the lower court upon the question of costs. The case was submitted in briefs which covered, we supposed, all points in controversy. Our attention is called, on an application for a rehearing, to the fact that though the suit is one in partition between joint owners, the District Court improperly threw the entire costs upon them. The judgment below is erroneous in the matter complained of, but the error can be corrected without a rehearing. It is ordered, adjudged and decreed that the judgment rendered by us in this case be so amended as to annul, avoid and reverse that portion of the judgment appealed from which condemns the present appellants to pay all the costs in the District Court; and it is now ordered, adjudged and decreed as to costs, that the appellees pay the costs of this appeal, and that those of the District Court be paid by the different parties according to their respective interests. This correction made, the application for a rehearing is refused.

In this case W. C. Perrault, District Judge, was called in.

McENERY, J., absent this term.

BREAUX, J., recused.

No. 1459.

HARRY B. HEWES ET AL. VS. JOHN P. BAXTER, TUTOR AND EXECUTOR ET AL.; J. W. STOKOE, TUTOR AND INTERVENOR.

The issues involved are the same as those in case of Harry B. Hewes *et al.* vs. Jno. P. Baxter, No. 1460, *ante* p. 1281.

APPEAL from the Nineteenth Judicial District Court, Parish of Iberia. *Voorhies, J.*

The opinion of the court affirming judgment of District Court was delivered by NICHOLLS, C. J.

In this case W. C. Perrault, District Judge, was called in.

McENERY, J., absent this term.

BREAUX, J., recused.

Hewes vs. Baxter et al.

No. 1465.

HARRY B. HEWES vs. JOHN P. BAXTER ET AL.

The refusal by a District Judge to grant an order applied for by one of three joint owners of movable property who, pending his suit for a partition of the same, had caused it to be sequestered, for a sale of the property as perishable, was within his sound legal discretion.

The order sought being interlocutory was not subject to appeal, unless shown to work irreparable injury.

A PPEAL from the Nineteenth Judicial District Court, Parish of Iberia. *Voorhies, J.*

Beattie & Beattie Attorneys for Plaintiff and Appellant.

P. H. Mentz and Walter J. Burke Attorneys for Defendants and Appellees.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff, in a petition to the District Court for Iberia, alleged himself to be a co-owner in indivision, of certain movable property described therein, and that his interest arose as a member of the late partnership of Milmo, Stokoe & Co. That the partnership was dissolved and the affairs settled and liquidated, but that all of the described movable, as well as the immovable property, was still in indivision, and that he had brought suit for the partition of said property belonging to the joint owners, which suit was still pending in the District Court. That he feared and believed that, pending the final decision of said suit, his co-owners might and would make use of their possession as co-owners, to dilapidate and waste said property and the revenue thereof, and would part with, conceal and dispose of said property during the pendency of the above mentioned proceedings. That all of said property was perishable and was fast going to ruin and destruction, and he prayed for a writ of sequestration, which, being granted, the property was taken possession of by the sheriff in execution of the order.

Subsequently to this, plaintiff presented a petition for an order for the sale of the property sequestered, upon the ground that it was perishable and fast being lost by natural decay and deterioration.

Hewes vs. Baxter et al.

The application was refused, and from this refusal of the District Judge the present appeal was taken.

Appellant is one of the plaintiffs in the suits of Hewes *et al.* vs. Baxter, Tutor, *et al.*, *ante* p. 1281, just decided by us, and the property sought to be sold under this order, was part of the property the sale of which was ordered to be made on the judgments in those cases in order to effect a partition, but which sale was held up at the time of this application by a suspensive appeal taken by the defendants.

The order prayed for was not sought to be obtained contradictorily with the other joint owners, but *ex parte* from the judge upon affidavits submitted to him. The co-owners, all living in the parish of Iberia, were completely ignored in the matter. The District Judge expressed no opinion and made no ruling upon the merits of the application, but denied it, stating that were he to grant it he would usurp authority belonging exclusively to the appellate court. He said that the court would nullify the suspensive appeal taken from its own decree, which orders the sale of this identical property; that it would ignore the rights of the parties concerned in the ownership of that property, by giving *ex parte*, and without a hearing an order depriving them of their rights and property.

The order prayed for was interlocutory, and of a character such as fell under the sound judicial discretion of the District Court. That decision this court would not undertake to interfere with, unless under circumstances evidently leading up to irreparable injury. This case presents no feature of that kind. The course pursued, of not acting *ex parte* in the premises, was eminently right and proper, independently of any question as to the effect of the pendency of the suspensive appeal, upon the powers of the District Judge.

The judgment of the District Court in the partition suits having been just affirmed by us, this property can now be sold without delay. The co-owners of the plaintiff, made parties to this proceeding only on appeal, have moved for the dismissal of the appeal. The motion is well founded and the appeal is dismissed at appellant's costs.

In this case W. C. Perrault, District Judge, was called in.

McENERY, J., absent this term.

BREAUX, J., recused.

State ex rel. Comeau, Administratrix, vs. Clerk.

No. 1457.

STATE OF LOUISIANA EX REL. ELIZA COMEAU, ADMINISTRATRIX, VS.
THE CLERK OF THE ELEVENTH JUDICIAL DISTRICT COURT, PAR-
ISH OF ACADIA.

46	1289
110	481
46	1289
120	161

1. It is the duty of the appellant, not that of the clerk of the District Court, to file the transcript of appeal.
2. An appellant has the right immediately after the perfection of an appeal to demand a transcript of the case from the clerk, and the clerk must furnish it within a reasonable time after demand, otherwise he can be compelled to do so by *mandamus*. If, however, being in default, he, before a *mandamus* is taken out, tenders to the appellant a transcript duly certified, the appellant can not decline to receive it and *mandamus* the clerk as if he had refused absolutely to furnish it, on the ground that the transcript tendered was so defective that appellant's appeal might be dismissed on account of its imperfections. It is the duty of the appellant to receive and file the certified record and protect his appeal by easy and familiar methods. Appellant can not collaterally raise and have determined on a *mandamus* the correctness of the transcript so tendered. Questions of that character must be raised and determined under different circumstances and conditions. When the clerk, under the circumstances stated, being ordered to file a transcript on the first day of the term of this court, or show cause to the contrary, does so on the day named, an application for a *mandamus* based upon the contingency of a refusal must be dismissed at relator's costs.

A PPLICATION for a *Mandamus*.

Henry L. Garland for the Relator.

E. L. Wells and E. P. Veazie for the Respondent.

The opinion of the court was delivered by

NICHOLLS, C. J. Relator avers that a judgment was rendered against her in the suit of C. Comeau vs. Gottlieb Miller and Mary J. Fischer (Widow Miller and A. Adler & Co. third opponents) in the District Court of Acadia, on the 16th June, 1893; that an appeal was granted to her, returnable on the first Monday of July, 1894, instead of the July term, 1893, as the transcript could not be prepared in time for the latter term. That she perfected the appeal by giving bond. That at the time of furnishing her bond she requested the clerk of the District Court to make out the transcript of the case during the summer months of 1893, and she has on many occasions since re-

State ex rel. Comeau, Administratrix, vs. Clerk.

requested him so to do. That in the month of June, 1894, she was urgent in her requests to have said transcript completed and delivered to her. That on the 22d June, 1894, she received by express the transcript, which was so confused and imperfect that she would not take the responsibility of filing it in the Supreme Court for fear of dismissal of her appeal. That through her attorney she has remonstrated with the clerk as to the informalities and imperfections of this transcript, made up at the eleventh hour, and exhibited to him the rules of the Supreme Court in regard to the preparation of transcripts. That should the record not be filed in the Supreme Court within the legal delays by reason of the district clerk failing to make a new transcript it would not be her fault. In view of the premises, she prayed for further time to bring up the record, for a restraining order suspending the execution of the judgment appealed from, and for a *mandamus* commanding the clerk of the District Court of Acadia to make a legal transcript of the pleadings filed, proceedings had, evidence adduced, judgment rendered and appeal granted, and bond of appeal in the above mentioned case, and for an order and rule to issue from this court commanding the clerk and the parties to the suit, to show cause why the prayers of relator's petition should not be granted.

An alternative writ of *mandamus*, with a temporary restraining order, was granted upon this petition, without prejudice to the other side to move for a dismissal of the appeal.

On the first day of the present term the district clerk filed an answer or return in which, after denying generally all the allegations of the petition, he averred that the appeal referred to was made returnable to this court on the first Monday of July, 1894. That with his answer or return he presented to be filed, a full and complete transcript of all the documents filed, proceedings had, and evidence adduced in the above mentioned cause. He prayed that the writs asked for be denied at relator's costs.

The court ordered the transcript to be filed without prejudice to the right of appellees to move for a dismissal of appeal in the main suit. The district clerk having filed a transcript with his return there is no occasion for a writ of *mandamus* to issue. Relator, however, insists that the costs of the present application should be cast upon the clerk.

Article 585 of the Code of Practice declares, that "after the

State ex rel. Comeau, Administratrix, vs. Clerk.

appeal is allowed and the surety given, the clerk of the court from whose judgment the appeal is taken, shall make a transcript of all the proceedings, as well as of all documents filed in the suit, and annex to the same the petition of appeal in order that it may be delivered to the appellee when demanded."

The appellant has the right at any moment after the appeal has been perfected, to call upon the clerk to make out and deliver to him the transcript referred to, and it is the duty of the latter to comply within a reasonable time thereafter with the demand so made. He is not justified in postponing to the last moment the making out and delivering of the record. It is the duty of the appellant, not the clerk, to file the transcript in the appellate court. C. P. 587.

Article 780 of the Code of Practice declares that if any clerk shall neglect, fail or refuse to issue any copy, paper, citation, writ, or other process, when so required to do so by any party, or their counsel, authorized to require such service, who has made the proper deposit and complied with the requirements of law authorizing them to require such service from the clerk, such clerk shall, on such facts being brought to the attention of the court in writing, sworn to by the party making it, which shall be served with the order made thereon by the clerk fixing the time for trial thereof, not exceeding two days from the date of the order, be brought to trial, which trial shall be summary without a jury, and if such clerk shall be found guilty of the charge he shall be considered in contempt of court, and be fined in a sum not exceeding one hundred dollars, or imprisoned not exceeding thirty days, or suspended from office, either one or all, and the clerk and his securities on his official bond shall be responsible to any party for any damage that may result from his failure, refusal or neglect to perform any duty required of him by law.

The next article (Art. 781) declares that if any clerk of court fails to comply with any legal formality in issuing citations, petitions, or other process, or if the same be not a true copy or legal in form or substance, no fee shall be charged by the clerk for issuing any such copy or process.

In addition to the protection given to litigants through the above provisions of the law, the clerk may be compelled in proper cases, by writ of *mandamus*, to fulfil any of the duties of his office which may be legally required of him.

State ex rel. Hill et al. vs. Judges.

If in the case at bar the clerk of the District Court, after having been asked to make out a transcript of appeal by the appellant, failed to do so in a reasonable time, appellant could unquestionably have forced him to do so by *mandamus*; but if before such remedy was resorted to the clerk, who had been before in default, complied (though tardily) with his duty, it was too late to have recourse to that particular proceeding. In the case before us, assuming that the clerk failed to have made out the transcript within the time in which it should have been made, he none the less, before relator took action in the matter, tendered the relator a record of the case. Relator says that she would not receive it on account of its utter insufficiency, which might endanger her appeal, and that she would be held responsible for filing such a record.

We think appellant should have received and filed the transcript herself. If there were defects in the transcript, she could have saved herself from any damages in the premises by easy and familiar methods. It would not be proper for us on an application for a *mandamus* to enter into an examination as to whether a record which had been tendered by the clerk of court as a correct and proper transcript was such or not. Questions as to the sufficiency of the transcript would have to be raised and determined under different circumstances and conditions. Finding, by relator's pleadings, that, prior to the petition herein, the clerk of the court had tendered to her what he claimed to be a proper transcript in the case, which relator declined to receive; finding that upon being ordered by this court to make a legal transcript in the matter of the suit referred to on the first day of the present term, or show cause to the contrary, he had, on the day named, filed what he declares to be such a transcript as was ordered, we are of the opinion, as we have said, that there is no occasion for issuing the writ of *mandamus* asked for and it is hereby refused at relator's costs.

No. 1478.

STATE EX REL. JOHN HILL ET AL. VS. THE JUDGES OF THE COURT
OF APPEALS FOR THE THIRD CIRCUIT OF THE STATE OF LOU-
ISIANA.

Assessments or taxes to build and maintain levees under acts organizing and providing for Boards of Commissioners of levee districts, though treated as local assessments not subject to the rule of conformity, or the limitation applicable

46	1292
47	708
46	1292
48	851
46	1292
51	808
51	1808
51	1906
51	1907
51	1919
51	1920
46	1292
152	830

HARVARD LAW LIBRARY

State ex rel. Hill et al. vs. Judges.

to general taxation, still are taxes within the purview of Art. 81 of the Constitution, giving to this court appellate jurisdiction in all cases involving the constitutionality or legality of any toll, impost or tax whatever. Constitution, Art. 81; Acts No. 44 of 1886, No. 79 of 1890; Burroughs on Taxation, Chapter XXII; 11 An. 338, 222; 28 An. 323; 29 An. 460; 48 An. 339.

APPPLICATION for a *Mandamus*.

T. H. Lewis, E. N. Cullom and Kenneth Baillie for the Relators.

J. R. Thornton for the Respondents.

APPLICATION FOR A WRIT OF MANDAMUS.

The opinion of the court was rendered by

NICHOLLS, C. J. Relators aver that they, each and severally, own large quantities of swamp land in the parish of St. Landry, situated within the limits and territory comprising the Red River, Atchafalaya and Bayou Boeuf Levee District, as defined and established by Act No. 79 of the General Assembly, approved July 5, 1890. That in the years 1892 and 1893, relators severally and each for himself or herself, filed in the District Court for St. Landry parish, suits before said court in which they declared and averred in substance as follows: That is to say (all of said suits having by consent been consolidated for trial and tried on appeal under such consolidation). That their lands are by said act, approved July 5, 1890, within a district subject to a system of special taxation, which the board of commissioners of said levee district, are empowered by said act to levy, assess and collect upon all lands in said district benefited by the levee system. That assuming to act under and by virtue of the power and authority granted and conferred upon them by said act, said board of commissioners have caused and directed the assessor of the parish of St. Landry to list all aforesaid property as subject to the special taxation and local assessments provided for in Act No. 79 of 1890, and said property has been carried on the special assessment roll, listing and describing all property which is alleged and claimed to be subject to the special taxation provided for in said act, and a copy of said assessment has by said assessor been filed in the office of the sheriff and *ex-officio* tax collector of St. Landry parish, and T. S. Fontenot, the sheriff, is now proceeding to the col-

State ex rel. Hill et al. vs. Judges.

lection of taxes levied and carried on said roll as provided for in Sec. 9 of the act aforesaid, and relator's aforementioned property is assessed on said rolls filed in the sheriff's office as follows: At the rate of five (5) cents per acre of said lands, and at the rate of five (5) mills upon the valuation of said lands as fixed by said assessor, and the said sheriff, *ex-officio* tax collector, unless enjoined will sell the same for cash to pay and satisfy the said alleged taxes or local assessment. Relators further declared in the alternative in said suits in substance as follows: That said Act No. 79, if it purports to authorize the levying and collection of the aforesaid taxes or assessments, is illegal and unconstitutional, because said lands are not protected, reclaimed from overflow or inundation, improved or benefited by the levees built or proposed to be built by said board. That they require no such protection and can derive no possible benefit from said levee, but, on the contrary, said levees will injure their aforesaid lands and in fact detract from their value, and that therefore said assessments are a taking of private property without compensation; that the special averment is made in the petition of John Hill and Mrs. Clementine Phelps, that said acreage tax is further illegal, because it is levied indiscriminately at the same rate upon the cultivated and settled lands on the front, as upon the swamp lands involved in these suits, the latter being worth not more than fifty cents per acre, while the former class of lands are worth not less than eight to ten dollars per acre, as will be seen by copies of the petitions in said suits annexed; that though said averment of nullity is not specially made in the other suits, yet by consent, all the testimony in the John Hill suit in support of that averment, was offered in all the other cases and is to be considered by the court; that relators further averred in the said suits, that the acreage and valuation taxes of five mills upon their aforesaid lands, amounted to, in the case of each of the relators, a sum exceeding one hundred and under two thousand dollars.

That relator after making the said averments, which are substantially given as made in the said suits, sued out a writ of injunction restraining the assessor and tax collector from proceeding any further in the assessment of said lands or in the collection of taxes thereon until the further orders of the District Court of St. Landry parish, and they prayed for judgment in their favor, each for himself and herself, and against the sheriff and tax collector and said

assessor, asking the perpetuation and maintenance of the injunction sued out in said suits, declaring said tax illegal and unconstitutional, and declaring the assessment of said acreage tax to be illegal, and for judgment further decreeing the property belonging to each of relators severally not to be subject to the aforesaid taxes or local assessments, and ordering the same to be stricken from the assessment rolls and tax rolls of the parish of St. Landry.

That though they use the word "tax" in their pleadings they do not wish to be understood as contravening by the use of that term the settled doctrine of the Supreme Court that an acreage tax for special levee purposes is not a "tax proper," but a local contribution, based upon supposed benefits conferred, and therefore not the subject of an appeal to the Supreme Court under Art. 81 of the Constitution of 1879.

Relators further aver that after the filing of the said suits in the District Court for St. Landry, the same were, after issue joined in said suits, duly assigned for trial, and tried pursuant to law, the Board of Levee Commissioners answering in each and every case by pleading the legality and constitutionality of the aforesaid tax or local assessment and the act of the Legislature authorizing said tax or assessment, and praying for a dissolution of the injunction sued out by relators respectively, and for a rejection of the demand of relators in said suits. Relators further declare that judgments in each of the aforesaid suits were duly rendered by the District Court of St. Landry, in each and every case, rejecting and disallowing the demands and prayers of the relators in said suits and dissolving the injunction taken out by them in said suits respectively. They aver that they each and severally, prosecuted suspensive appeals from the aforesaid judgments to the court of appeals of the third circuit of the State of Louisiana, sitting in and for the parish of St. Landry, and said appeals were duly filed in said court.

That on said cases coming up for a hearing in said Circuit Court of Appeals, sitting at Opelousas, the counsel for the Board of Commissioners in each and every one of the cases, filed a motion to dismiss the appeals taken as aforesaid, on the ground that said Court of Appeals was without jurisdiction *ratione materię*, for the reason that the constitutionality and legality of the taxes are in contestation, and that therefore said appeal was not legally cognizable by said Court of Appeals. That after the hearing of the said motion to dismiss in

State ex rel. Hill et al. vs. Judges.

each and every case, the said Court of Appeals sustained said motion to dismiss all and singular the appeals taken in said cases by relators respectively, as would appear by the judgments of dismissal annexed to relators' petition. Relators, each for himself and herself, aver that in dismissing the appeals taken by relators as aforesaid, and in declining to pass upon the merits of said causes, the Court of Appeals has done an act amounting to a denial of justice to relators respectively, and they aver that the Court of Appeals, under the averments of their petitions and under the evidence, alone had jurisdiction of the cases.

They aver that they have no other mode of obtaining relief from the said illegal and unwarrantable action of the Court of Appeals except by application to this court for relief and redress in the premises, as of right. That they will be irreparably injured unless the Court of Appeals be ordered to reinstate said cases upon the docket of their court for trial, and ordered to proceed to try and finally determine the same according to law, and this relators, each for himself and herself, asks shall be done, and that a writ of *mandamus* issue to the judges of said court ordering them so to do.

The judges answer that they do not think, under the allegations of the original petition, that they have appellate jurisdiction, but under Art. 81 of the Constitution the Supreme Court has; that for these reasons the appeals were dismissed on motion of appellees' counsel.

In sustaining the motion to dismiss the appeal in the case of John Hill vs. T. S. Fontenot, Sheriff and Tax Collector, the Court of Appeals said:

"The petition alleges that the sheriff and tax collector of St. Landry parish had seized and advertised certain lands therein described for levee taxes, assessed by the levee commissioners in the Red River, Atchafalaya and Bayou Boeuf Levee District. The taxes consisted of five mills tax proper and five cents acreage tax, amounting in the aggregate to two hundred and thirty-nine dollars and twenty-three cents. The petition alleges that said tax and local assessment of the acreage tax is in violation of Arts. 1, 2, 156, 203 and 218 of the Constitution of 1879.

"Article 81 of the Constitution confers jurisdiction on the Supreme Court in all cases where the constitutionality or legality of a tax shall be in contestation. We have carefully considered the brief of counsel and authorities referred to urging jurisdiction in the court,

because the amount of the tax and illegality of the assessment are within the jurisdiction of this court. We are satisfied, however, that the constitutionality and legality of a tax are in contestation, whether it is called a tax or local assessment, and comes within the appellate jurisdiction of the Supreme Court.

"The complaint that the valuation of the property is excessive must be made before the police jury as a board of reviewers as a condition precedent before an appeal can be taken thereon. 39 An. 206. For these reasons the court is without jurisdiction and the motion to dismiss the appeal should prevail, and it is so ordered at appellant's costs."

Appellants in these different cases, claiming that the action of the Court of Appeals in respect to its own jurisdiction was not well founded, have applied to this court for a writ of *mandamus* to compel the reinstatement of the cases on the docket of that court and a trial and determination by it of the issues involved.

By Art. 213 of the Constitution of 1879 it is declared, that "a levee system shall be maintained in the State and a tax not to exceed one mill may be levied annually on all the property subject to taxation and shall be applied exclusively to the maintenance and repairs of levees," and by Art. 214 "that the General Assembly may divide the State into levee districts and provide for the appointment or election of levee commissioners in said districts, who shall, in the method and manner to be provided by law, have supervision of the erection, repairs and maintenance of the levees in said district; to that effect it may levy a tax not to exceed five mills on the taxable property situated within the alluvion portions of said districts subject to overflow."

The second of these articles is merely supplemental or ancillary to the first—the two looking to the creation of an effective levee system in the State.

By the first all property in the State subject to taxation may be charged, independently of any question of direct benefit to the owners of the property subjected to the charge from the levee system, with an annual tax not to exceed one mill, to be applied to the maintenance and repairs of levees generally in the State. By the second, all taxable property situated within the alluvion portions of levee districts, which the Legislature is authorized to create, subject to overflow, may be charged annually with a tax not to exceed five

State ex rel. Hill et al. vs. Judges.

mills, to be applied to the erection, repair and maintenance of levees within the district, also without regard to the question as to whether the owners of the property charged with the tax are or are not benefited by the levees erected, repaired and maintained in the special levee district. In both cases all discussion as to the justice or propriety of the imposition of taxes in aid and furtherance of objects from which direct and immediate benefits shall not enure or be seen to enure to the parties charged, is cut off by the provisions of the Constitution itself, which silences all individual contentions on that subject, and withdraws from courts any consideration of arguments of that character.

In 1890 the General Assembly of the State, claiming to be legally and constitutionally authorized so to do, created by Act No. 79 of that year a "levee district to be known and styled the Red River, Atchafalaya and Bayou Boeuf Levee District" and provided for a board of levee commissioners for that district. The object and purpose of the creation of the district and of the powers and duties of the board, were those pointed out by Art. 214 of the Constitution just referred to. In order to enable this board to carry out its special duties all taxable property in the alluvion portions of the district subject to overflow were declared subject to be charged with the tax provided for in Act 214—that is to say, a tax not to exceed five mills; but over and beyond this amount the tenth section of the act enacted "that for the purpose of raising additional funds for said district the said Board of Levee Commissioners shall have power, and it is hereby authorized, to levy an annual contribution or assessment upon all lands in said district subject to taxation for levee and drainage purposes not to exceed five cents per acre. Said contribution or assessment shall be assessed, collected and paid into the State treasury to the credit of the Red River, Atchafalaya and Bayou Boeuf Levee District in the same manner and at the same time as other taxes herein provided for are assessed, collected and paid."

The "Board of Levee Commissioners" provided for in this act, having been appointed by the Governor and organized, caused, it would appear from the pleadings in this case, to be listed by the assessor of the parish of St. Landry all the property deemed subject to taxation for levee and drainage purposes in the parts of the parish of St. Landry subject to overflow within the levee district, and levied a tax of five mills upon said property and an additional

contribution assessment or tax of five cents per acre upon the same, among which was included certain property of the relators. The tax contribution or assessment not having been paid upon the same, they were advertised for sale by the tax collector of St. Landry in enforcement of the tax, but the sales of their respective properties were enjoined by the present relators. It is not pretended that these lands are not within the territorial limits of the levee, nor that they are not within the alluvion portions of the district subject to overflow; in other words, it is not claimed that the lands do not fall under the literal terms of the law as lands subject to taxation for levee and drainage purposes. What is asserted is, that though falling inside the literal terms of the law, that none the less they are not subject to the charges for which they are now sought to be sold by the tax collector.

It is maintained by the plaintiffs in injunction that not only were the lands and the owners of the same not benefited by the levee system and the levees of the special levee district, but that they were actually injured thereby; that *quoad* those lands and the owners thereof, the charges imposed were not local assessments in consideration of benefits received, but so far as those lands and their owners were concerned were really taxes, and taxes illegally assessed, for the reasons and grounds assigned in their pleadings. The claim asserted in the injunctions was that under the guise of local assessments for special benefits received or to be received, the General Assembly, and the Board of Levee Commissioners under its authority, had imposed and was attempting to impose and enforce an illegal and unconstitutional tax, from which they sought, through the courts, to be relieved. We are ignorant of the reasons assigned by the District Court for dissolving the injunctions, as the judgments in the different cases are in the record. We are told, however, that the levee board maintained that the charges were not taxes, tolls or imposts, but local assessments for special benefits. When the parties appealed to the Court of Appeals, the Board of Levee Commissioners made a motion to dismiss on the ground of want of jurisdiction *ratione materiae*. The court sustained the motion for the grounds assigned in its judgment. Relators argue that the board having, in the District Court in defence of the merits, urged that the charges imposed were neither a tax nor an illegal tax, is estopped in the appellate court from urging there that they are taxes for the purposes

State ex rel. Hill et al. vs. Judges.

of defeating the jurisdiction; but the test of jurisdiction is not the grounds which may be set up in defence to the claim set up in the petition, but the claim itself set up in the petition, and, besides this, if the Court of Appeals was in reality without jurisdiction *ratione materiæ*, it would be forced *ex officio* to notice its want of power to decide the issues raised. The dismissal would not rest upon the motion of the defendants, and no estoppel would apply to the court assuming, it would apply to the Board of Levee Commissioners.

We are of the opinion that the cases involve the issue of tax and illegal tax *vel non*, and that that is an issue which has to be passed upon and determined by this court and not the Court of Appeals.

The eighty-first article of the Constitution, dealing with the appellate jurisdiction of this court, extends it "to all cases in which the constitutionality or legality of any tax, impost or toll, whatever may be the amount thereof," and directs that "in such cases" the appeal on the law and the facts shall be directly from the court in which the case originated, to the Supreme Court.

We are of the opinion that the use of the words ALL CASES, and of the words "any tax, impost or toll *whatever*" clearly indicates on the part of the framers of the Constitution an emphasized intention to give to the terms tax, toll and impost, the widest meaning to which they were susceptible, and to allow every citizen to have submitted to the test of legality and constitutionality by the highest court of the State, any charge upon his property imposed by the State or its subordinate political agencies, when claimed to be legally and constitutionally imposed by them in aid of governmental purposes, whether extending over the whole State or over particular localities.

In the cases referred to in relators' petition the charges imposed upon the respective properties, were unquestionably authorized and imposed by the General Assembly, and its subordinate agency, the Levee Board, in aid of the governmental public levee system, authorized by the Constitution to be maintained by the State.

The fact that charges imposed by the State or its subordinate agency, may differ and vary from each as to the particular circumstances and conditions under which they may be imposed, and the extent or resulting effect of their imposition, does not prevent, for the purpose of the special question of the jurisdiction of courts in deal-

ing with them, their falling in an extended sense under the terms "tax, toll or impost."

It is for this court, and it alone, finally to determine whether charges imposed upon the property of the citizen are or are not taxes, imposts or tolls, and, if so, whether they are legally and constitutionally imposed.

As cases arise under differing circumstances and under differing pleadings, we will determine whether the particular case falls within our exclusive appellate jurisdiction for decision or not. In the cases involved in this litigation we hold that we have such exclusive appellate jurisdiction. Counsel claim that there are decisions of this court which should lead us to a different conclusion; but the decisions relied on must, in these particular cases, yield to the conclusion reached by us, if, as contended by counsel, they would be in conflict with it.

We are not called on in this opinion to determine what the character of the charges referred to really are, whether they have been imposed inside of legal and constitutional powers, or whether they have been imposed in violation of legal and constitutional restrictions, limitations and prohibitions—those matters are to be determined hereafter; all that we are called upon to deal with here is the single question of appellate jurisdiction in respect to the issues raised by the litigation. On that point we are of the opinion that the Court of Appeals correctly dismissed the appeals for want of jurisdiction. The *mandamus* applied for must therefore be and it is hereby refused.

CONCURRING OPINION.

MILLER, J. The jurisdiction of this court under the Constitution extends to all cases in which the constitutionality or legality of any tax, toll or impost whatever, is involved. It is manifest the word tax in this part of the Constitution is used in its largest sense. After the words describing the jurisdiction of this court as extending to all cases involving the legality or constitutionality of *any* tax, toll or impost, there is added the word "whatever," *i. e.*, whatever the character of that tax, toll or impost. Constitution, Art. 81. While it is clear that enforced contributions in the nature of local assessments, as such assessments are termed under the levee acts, are levied without reference to the rule of uniformity or of the limita-

State ex rel. Hill et al. vs. Judges.

tion applicable to general taxation, still these local assessments are none the less taxes. They are treated as taxes in the text books and are taxes in the natural sense of the word, though restricted in their operations and freed from the provisions in the Constitution regulating general taxation. Burroughs on Taxation, Chapter XXII, discriminates the local assessment from a general tax, as an assessment imposed on the property of a particular district created by the Legislature, and levied on the theory of the benefit of that property to be secured by the tax. He designates that assessment as a tax. On what ground then is this court to hold that "any tax whatever" used in the jurisdictional article of the Constitution does not include that mass of taxation levied in the form of local assessments? Can it be supposed that the organic law, in extending the jurisdiction of this court to all cases involving the legality or constitutionality of any toll, impost or tax whatever, ever contemplated that, under this sweeping jurisdictional grant, the State or the citizens could be deprived of the jurisdiction of the highest court of the State over questions of the legality or constitutionality of taxation in the form of local assessments. Manifestly no such narrow construction of the grant of jurisdiction to this court can be supported.

The frequent contentions on the subject of local assessments in our courts, have turned mainly on the issue whether this form of taxation can be exerted under the uniformity rule and limitation in the Constitution, in respect to general taxation. Our courts have reached the conclusion that these local assessments are to be imposed without reference to this limitation or rule of uniformity. But that conclusion does not at all support the contention that local assessments are not taxes within the purview of Art. 81 of the Constitution, giving to this court jurisdiction whenever the legality or constitutionality of any tax whatever is involved, a jurisdiction to be exerted by appeal to this court direct from the court in which the case presenting the question originates. Burroughs on Taxation, Chap. XXII; The Drainage Case, 11 An. 338 *et seq.*; Crandall Case, 11 An. 222; 38 An. 323; 39 An. 460; 43 An. 337; Const., Arts. 81, 203, 209, 213, 214; Act No. 79 of 1890; Act No. 44 of 1886.

The decision in 33 An. 276, maintains that a question of the constitutionality or legality of an assessment under one of these levee acts is not within the jurisdiction of this court. Under what I conceive to be the requirement of the organic law announced in

Goldberg vs. Dobberton.

Art. 81 of the Constitution, that decision, in my judgment, can not be followed.

The issue now before us is simply as to the jurisdiction of this court.

I concur in the opinion of the Chief Justice.

No. 1471.

ISAAC GOLDBERG VS. ALBERT F. DOBBERTON.

1. Where persons mutually engage in bandying opprobrious epithets an action of slander is not to be encouraged for words thus uttered.
2. The interchange of opprobrious epithets and mutual vituperation and abuse will justify a judge in approving a verdict for the defendant, although the slanderous words were proved, and a verdict rendered in such a case will not be disturbed by the Supreme Court.

46	1303
48	619
46	1303
50	787
46	1303
107	235
46	1303
109	668
46	1303
d124	778

A PPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. *Fournet, J.*

E. L. Wells and D. B. Gorham Attorneys for Plaintiff and Appellant.

A. P. Pujol Attorney for Defendant and Appellee:

Cites *Johnson vs. Barnet*, 36 An. 320.

"One who is himself in fault can not recover damages from another who has retaliated in kind, although the latter was not justifiable in law, and this holds good in spite of the truism that one wrong does not justify another." 36 An. 38; 15 An. 48.

The verdict of the jury in cases of this nature is "never disturbed by appellate tribunals unless glaringly unjust or manifestly erroneous." *Young vs. Bridges*, 34 An. 335; 10 An. 559; 28 An. 94; 30 An. 926.

The courts of Louisiana have never encouraged litigation of this kind. 9 An. 358; 34 An. 336.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff alleges that on the public streets of the town of Lake Charles, and at the residence of the petitioner in the said town, in the presence and hearing of a large number of persons,

Goldberg vs. Dobberton.

the defendant, maliciously and without cause, slandered and defamed petitioner's wife, calling her by many vile names, and applying to her many vile epithets, which are set out in the petition, all of which was done by Dobberton with a malignant spirit, with the full purpose of damaging and injuring plaintiff, although defendant well knew that his declarations were wickedly false and slanderous, and that Dobberton has accordingly damaged and injured his said wife and himself. That she had always demeaned herself with modesty, virtue and chastity, and has heretofore enjoyed a good reputation and the esteem, respect and friendship of all her acquaintances and of the community, but that since the utterance of said vile and infamous slander her good name and character have been seriously damaged, and her friends and acquaintances have fallen away from and ceased to visit her, and in several instances have totally ignored her; that her spirit has been humbled and crushed, and she has suffered untold mental agony. That said cruel slander has constantly preyed upon her mind, making her nights sleepless and her days miserable. That being then and at the time of the institution of the suit in a delicate situation, her nervous system has been greatly shocked, her health injured and her life imperiled, and in consequence of said malicious acts of Dobberton they have been injured as aforesaid in the sum of ten thousand dollars.

That he himself has been injured and damaged by the defendant in the additional sum of five thousand dollars for this; that Dobberton, not content with slandering and abusing his said wife as aforesaid, upon being requested by petitioner to cease his said abuse and leave his premises, cursed and abused him, calling him by all manner of vile, vulgar and slanderous epithets too vulgar to be repeated, and, further, threatened the lives of petitioner and his wife, and in pursuance of his threats made a felonious assault upon them while peaceably at home by hurling heavy beer bottles and other deadly missiles at them, they barely escaping from his murderous assaults by hastily closing and bolting their doors. That by reason of said vile and slanderous abuse, uttered with the view of publicly defaming and injuring petitioners and bringing them into contempt and disrepute among his neighbors, in which he has been, unfortunately, too successful, and said wanton and malicious trespass as aforesaid, and the injury done to petitioner's feelings and that of his said wife as aforesaid, and the loss and expenses to which he has been placed

Goldberg vs. Dobberton.

by said tortious acts of Dobberton, and to secure his just rights thereon, he has been damaged and injured in said further sum of five thousand dollars, which he should recover from judgment. He prays for judgment against defendant for damages for fifteen thousand dollars.

Defendant pleads first, the general issue to that portion of plaintiff's demand wherein he seeks to obtain judgment for alleged libel and slander to plaintiff's wife. For answer to that portion of plaintiff's demand wherein he seeks to recover judgment against him for libel and slander of himself, he pleads in bar of plaintiff's right to such recovery that plaintiff and he mutually engaged in cursing and abusing each other at the time stated; that the language attributed to him in plaintiff's petition was preceded by language equally libelous, slanderous and defamatory on the part of plaintiff, who cursed and defamed him, applying to him many opprobrious, vulgar and indecent epithets; that at the time he was defamed, libeled and slandered as aforesaid, and when he used the language attributed to him to plaintiff, said declarations were without malice and were used in a moment of heat and passion, induced by the immediate preceding words of plaintiff; that both parties being equally in fault, plaintiff had no right to recover herein. He specially denies that he committed any assault or threw bottles at plaintiff. He prayed for and obtained a trial by jury. The jury rendered a verdict in favor of the defendant. After an unsuccessful attempt to obtain a new trial plaintiff appealed.

The families of the plaintiff and of the defendant occupied houses about fifteen feet apart, separated by a fence. Plaintiff's premises were leased from the defendant. On the 29th of May, 1893, plaintiff and defendant met at some point in the business part of the town of Lake Charles, where a conversation took place between them in reference to the continued occupancy of the property by Goldberg. Plaintiff says that Dobberton, in a loud tone, charged him with not keeping the premises in a cleanly condition; that being embarrassed by this, he withdrew without using any harsh or opprobrious language. The fact here mentioned is not referred to in the pleadings, but shown by the testimony, and is only important as it was doubtless the origin of the subsequent trouble between the parties. Plaintiff's testimony in the case begins with the statement that on his return home he heard the defendant abusing his wife, and that he

Goldberg vs. Dobberton.

heard him apply to her an insulting and disgraceful epithet, which he mentions, telling her to get out of his house, "to get out at once;" that defendant took a bottle toward the fence and threw it into the dining-room; that in the meantime he jumped over the fence, when plaintiff's wife closed the door; that defendant, then went from the rear of the yard, where this had occurred, to the front, cursing both plaintiff and his wife, and again repeating as to her the opprobrious terms which he had already used. That he went into the front street and there again used the same language. Plaintiff says that when defendant applied to his wife the particular expression mentioned, he, the plaintiff, said that was going too far, that he would break his neck; that he went into the room and got a revolver, but when he got back his wife held him and locked the door, so that he should not go any further.

It will be seen that Goldberg's testimony takes up the trouble as one already commenced between plaintiff's wife and Dobberton when he first came to a knowledge of it. He does not attempt to explain how it was or why it was that defendant came to use the language attributed to him to Mrs. Goldberg, or to say who commenced the conversation in which the insulting expressions were employed, and what was said at the commencement.

The only persons who seem to have been present at the beginning of the trouble were Goldberg and wife, Dobberton and Lizzie Smith, a colored woman employed by the Goldbergs, who was examined as a witness for the defence. Her testimony was loosely taken and does not give occurrences with any definiteness as to the time and order in which they took place.

From it, it would appear, however, that on Goldberg's returning home he related to his wife the circumstances connected with the meeting of himself and Dobberton on the street, which we have spoken of, and that a conversation took place between the two in relation to that matter in which some expression not complimentary to Dobberton was made use of by Mrs. Goldberg; that Dobberton, who was standing in his own yard at the time, heard this remark and became very much angered.

A very excited, wordy altercation followed, in which Goldberg himself is not shown, in so far as the witness' testimony goes, to have used any particular expression, though to use her expression "all three were fussing." She denies that Dobberton went into

plaintiff's yard, or jumped over the fence or threw any bottles. She denies that at that time defendant used toward Mrs. Goldberg the objectionable epithets spoken of in the petition. She says, however, that not wishing to get involved in the trouble she left before it was over; that she heard the parties still talking, but did not hear what they said. She says that in the course of that part of the conversation which she did hear that she heard Mrs. Goldberg make a very insulting remark to Dobberton, which remark witness repeated in court. This witness on being asked whether she had not, on the night of the disturbance, told a certain person named that defendant had applied to Mrs. Goldberg the epithets complained of, denied having done so. At a later stage of the proceedings the person referred to was produced and testified that the witness had told her on the night in question that defendant made use of one of the expressions, giving to her its corresponding word in French.

Dobberton's version of the affair is that at the time of the quarrel he was in his back yard, when he heard a woman using very vulgar language about some Dutchman; that at first he paid no attention, but finally he said something, though without mentioning any one's name; what he did say we do not know, as the transcript has left out some portion of this testimony. We think it clear that he must have said something uncomplimentary, which called out a remark from Goldberg's wife, for after making Dobberton declare that he had said something, without mentioning names, the transcript makes him here say, evidently to her, "I ain't talking to you," and immediately afterward that then this lady said, "I am talking to you" (using an insulting expression toward him).

Dobberton testifies, that after this, Goldberg from across the fence commenced abusing and cursing him violently, which language he admits he returned in kind. He says that Goldberg told him if he would come across the fence he would break his neck; that he tried to get over the fence, but that his wife took hold of him and prevented him; that he then went to the front toward the gate on the street and invited the plaintiff to come out and break his neck; that it was this threat of plaintiff's which made him mad. He admits using profane language and cursing on the street, but denies that he ever cursed Mrs. Goldberg at any time there. He states that he always respected her as a lady, and denies that either on this or any other occasion did he make use of the words alleged in the petition about her or to her.

Goldberg vs. Dobberton.

We say here that there is nothing in the record which in the slightest degree would go to impugn the character of the plaintiff's wife. The testimony of those who have known her all her life show that an attack upon it would have been thoroughly unjustifiable, and defendant so admits. The only person who testifies to defendant's having applied to plaintiff's wife the epithets mentioned in the petition is the plaintiff himself, and his testimony is met by that of the positive testimony of the defendant to the contrary.

If the particular expressions complained of were in fact used, they could not have worked any damage to character, as no third person has been produced on the stand who heard them. We are unable from the record to say who commenced the war of words and who was first to blame. The whole matter seems to have been one of those quarrels constantly occurring between neighbors, to the credit of neither, from which if either or both suffer damages it is from the fact of the quarrel itself and not from the force and effect of the various insulting or disgraceful epithets which are hurled at each other in the course of it.

We do not think that had defendant under the circumstances of this case made use of the expressions charged that any one hearing them as so used would have considered them other than violent expletives, utterly wrong and reprehensible, but none the less not really carrying within themselves charges of the commission of the offences which the terms themselves would have implied as having been committed had they been made coolly and deliberately. After a careful examination of this case we have come to the conclusion that at worst it would fall within the rule announced in *Fulda vs. Caldwell*, 9 An. 358, where it is said that the interchange of opprobrious epithets and mutual vituperation and abuse will justify a judge in approving a verdict for the defendant although the slanderous words were proved, and a verdict rendered in such a case will not be disturbed by the Supreme Court. See on this subject *Arteta vs. Arteta*, 15 An. 48; *Young vs. Bridges*, 34 An. 336; *Bigner vs. Van Benthuyssen*, 36 An. 38.

In *Johnson vs. Barrett*, 36 An. 320, this court said that where persons mutually engage in bandying opprobrious epithets an action of slander is not to be encouraged for the words thus uttered. We see no reason to disturb the verdict of the jury and the judgment of the court thereon rendered. The judgment appealed from is hereby affirmed.

Estate of Hardy.

No. 1474.

ESTATE OF MARY T. HARDY.

1. Under Sec. 10 of the Revised Statutes any creditor or person interested has the right to require that administrators shall give new or additional security for the faithful performance of their office as often as once in every twelve months, and oftener if the court, on motion to that effect, may judge it to be necessary. The tutrix of a minor who is an heir in a succession, by reason of representation of her deceased father, is authorized in her capacity as tutrix to make this motion, although she be also administratrix of the succession of the father. The minor is a "party interested" in the matter.
2. Where, since the administrator of a succession qualified as such under Art. 1048 of the Civil Code, the United States Court of Claims has approved a claim against the government for over ten thousand dollars, the recognized claim is a credit of the succession, and the District Judge acted correctly in ordering an inventory to be made of the same and the administrator to give additional security based upon it. The administrator has no right to have the giving of the new bond postponed until Congress shall have made an appropriation to pay the claim.
3. The administrator has no right to limit the amount of the new bond so as to correspond with the share which the minor may have in the new asset by reason of the other heirs not having asked or exacted additional security.

A PPEAL from the Eleventh Judicial District Court, Parish of St. Landry. *Perrault, J.*

The record shows that in October, 1890, James M. Dowling was qualified as administrator of the succession of Mary T. Hardy, wife of Thomas C. Anderson. That, for the purpose of qualifying as such, he furnished a bond for four hundred and sixty-four dollars, the only known property at that time being a small piece of land near the town of Opelousas, valued in the inventory at one hundred and twenty-seven dollars. That this tract, together with another small tract in Acadia parish, which seems to have been overlooked when the inventory was made, was sold at public auction, the price of both amounting to two hundred and fifty dollars. Mrs. Anderson left as her heirs a number of children and grandchildren. Prior to her death she had advanced against the United States a claim for stores and supplies taken by or furnished to the government during the late war, which, after her death, was prosecuted in the name of her administrator, the appointment of Dowling having doubtless been made for that very purpose. The claim referred to has been recently approved by the Court of Claims to the amount of ten

46	1809
48	1823
46	1809
104	577
104	580

Estate of Hardy.

thousand six hundred and ten dollars, and although Congress has as yet taken no action in the matter, there is every reason to suppose that ultimately an appropriation will be made to pay the same and that it will be paid either to the succession representative or to the heirs.

Matters being in this situation, E. K. Anderson, one of the sons of the deceased, and the minor children of another son, William F. Anderson, represented by their mother and tutrix, served a rule upon the administrator to show cause why he should not furnish bond with security for one fourth over and above the said sum of ten thousand six hundred and forty dollars, conditioned as the law directs, in view of this newly obtained asset of the succession, and why, in the event of his neglecting, failing or refusing to furnish said additional bond, he should not be destituted of his office as administrator and Henry L. Garland, senior, should not be appointed and qualified in his place. The administrator excepted to the rule: (1) That it was premature in this, that there has been as yet no appropriation made to pay the claim; (2) that it is premature for all the demands therein contained; (3) that the only party in the rule is Mrs. Virginia Garland, who claims but one-fifth of the succession, the other four heirs objecting to said increase of bond, and she consequently has no right to ask a bond on the whole estate; (4) that the court can at the present only pass on the application for increase of bond, and can not, in anticipation of the failure to furnish a new bond for increased amount remove the present administrator, should he fail to comply; (5) that no one else can be appointed *ex officio* by the court; that no appointment can be made without previous publication required by law.

Mrs. Virginia Garland subsequently intervened in the rule as administratrix of the succession of her first husband, William F. Anderson, making the same allegations and prayers in that capacity as she had previously made in her capacity as tutrix.

This intervention was filed by reason of an exception taken to the application of the tutrix for an increase of bond on the ground that the succession of William F. Anderson had been placed under administration, with his widow as the administratrix thereof, and the administratrix was alone authorized to require an increase of the bond. The intervention was never served, and its consideration by the court was opposed on that ground.

In the judgment pronounced by the court this opposition was held to be well founded, and all evidence taken under it stricken out.

Estate of Hardy.

The District Judge sustained the fourth and fifth exceptions of the administrator, but overruled the first three. He ordered that an inventory be taken of the claim awarded to the estate by the Court of Claims, and ordered James M. Dowling, the administrator, "to give additional bond, as required by Art. 1048 of the Civil Code, within ten days from the date of the judgment, upon the basis of the inventory and appraisal of said claim ordered to be made.

The administrator appealed.

H. L. Garland and *E. N. Cullom* Attorneys for Plaintiff and Appellee.

A. Voorhies and *W. S. Frazee* Attorneys for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. Article 1048 of the Civil Code says: "The security to be given by every administrator thus named shall be one-fourth beyond the estimated value of the movables and immovables, and of the credits comprised in the inventory, exclusive of the bad debts. By bad debts are understood those which have been prescribed against and those debts due by bankrupts who have surrendered no property to be divided among their creditors."

It is not pretended that this claim has been prescribed, or that the United States has gone into bankruptcy, and it certainly must be classed as a "credit." Art. 1048, C. C., is intended to safeguard and protect all partners in interest against misconduct on the part of succession representatives, and to insure the faithful administration and proper application of everything of value which passes or is liable to pass through their hands, and it has to be construed liberally in aid of that purpose. We think this claim has reached a point at which it may be fairly presumed that within a short period the government will provide for its payment, and that the amount paid will pass into the hands of the administrator in office when the period for that payment arrives. The heirs have the right to anticipate the happening of that event, and, in view of the law's necessary delays in removing one administrator and replacing him by

Estate of Hardy.

another, if such necessity should arise, to make certain that when the payment is made the administrator then in position shall have fully guaranteed the fidelity of his gestion.

We see no good reason why the administrator should not give the security now. Whether it be given now or later, the responsibility of the sureties will not be advanced to a date prior to that of legal settlement, nor will it be a dollar less in one case than in the other.

We see no necessity for the continued existence of the administration of this succession except for the collection of this very asset. There seems to be no property in his hands and no one could be injured by the present exaction of a new bond, whilst on the other hand the rights of all parties will be protected beyond all possible contingencies. If the administrator be unwilling to give the bond, it will be very easy for him to resign and permit some one to qualify who will give it. No one could possibly be prejudiced by this course and we think the heirs entitled to have it followed.

It is argued that, granting that additional security can be demanded, the tutrix of these children, who represent only one of five branches of heirs of Mrs. Anderson, would be only entitled to exact a new bond to cover one-fifth of the government claim, and that counsel of the tutrix has admitted a willingness that this should be done. We presume that counsel meant that the tutrix would be willing if the minors could be legally secured by such a bond, but it is evident they would not. In the first place, though the value of the assets of the succession has been brought to our notice, we are ignorant as to who the creditors may be or to what amount they may have claims. Again, the court would not be authorized to vary the form in which it should be given nor the effect of the same. A bond given for one-fifth of the claim, made in legal form, would necessarily enure to the benefit of all parties in interest and could not possibly be limited to the protection of the minors alone. The latter, therefore, would not receive from such a bond the security which this expressed willingness to receive must be held to have contemplated. The other heirs have done nothing which would estop them from claiming the benefit of any bond which may be given, though they might not themselves have asked for it. We think the judgment of the court appealed from is correct and it is hereby affirmed.

Rehearing refused.

No. 1475.

AMERICAN NATIONAL BANK VS. VITERBO & BROS.

Two acts of sales declared simulated and fraudulent, in view of the testimony as to the relations of parties, the small means of the purchasers relatively to the value of the things purchased, the simultaneous passing by the vendors of a series of acts by which they transferred all of their property to third persons, the suddenness of the propositions to sell, the celerity with which terms of sale were fixed and sales made, the active interest in the affairs of the vendees manifested by the vendors after the sales, and the correspondence of after occurring events with prior announced intentions by the vendors.

A PPEAL from the Seventeenth Judicial District Court, Parish of Calcasieu. *Fournet, J.*

The present suit was instituted against the commercial firm of L. Viterbo & Bros., doing business in Calcasieu parish, upon their promissory note for five thousand dollars, dated November 2, 1893, payable to the order of John A. Hubbard, endorsed by Hubbard in blank and discounted by the plaintiff. With the main demand was coupled a prayer for a writ of attachment of defendants' property, the application for which was based upon allegations that plaintiffs verily believed that defendants were about leaving the State permanently without there being a possibility, in the ordinary course of ordinary proceedings, of obtaining or executing judgment against them previous to departure, or that they have left the State permanently, or that they concealed themselves to avoid being cited or forced to answer in this suit, or that they have mortgaged, assigned or disposed of, or are about to mortgage, assign or dispose of their property, rights or credits with intent to defraud their creditors, or to give an unfair preference to some of them, or they have converted or are about to convert their property into money or evidences of debt with intent to place it beyond the reach of their creditors.

The order was granted, and acting under it the sheriff seized a stock of goods in a store in the town of Jennings: certain mules, horses, agricultural implements and seed rice on a farm which had been leased and cultivated by defendants. The merchandise attached was appraised at three thousand two hundred and sixty-two dollars, and the farming implements, mules, etc., at six thousand four hundred and seventy-eight dollars. The writ was executed on February 3, 1894. On February 19, U. R. Gassin and W. D. Reeves intervened

National Bank vs. Viterbo & Bros.

in the suit, the former claiming ownership by purchase from defendants of the stock of goods, and the latter of the property seized upon the farm, also by purchase from defendants. Defendants moved to dissolve the attachment on various grounds. The motion was overruled and the defendants answered, praying for trial by jury, and the prayer being granted the issues raised in the case were subsequently so tried. The property claimed by intervention was delivered to the claimants on forthcoming bonds.

Plaintiffs answered the interventions, charging simulation and fraud in the alleged purchases of the property. On the trial the jury rendered a verdict in favor of the plaintiffs against the defendants and in favor of the plaintiffs against the intervenor Gassin, but in favor of the intervenor Reeves against the plaintiffs. The plaintiffs appealed from the judgment in favor of Reeves. Gassin appealed from the judgment against him on his intervention. The defendants did not appeal.

A. P. Pujol and W. B. Spencer Attorneys for Plaintiff, Appellant.

Moise & Cahn and W. F. Schwing Attorneys for Intervenors, Gassin, Appellant, and Reeves, Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The law governing the case is simple, and the attention and efforts of counsel of the different parties have been principally directed to the facts.

Viterbo & Bros., the defendants, were largely engaged in the rice business—partly as planters, partly as purchasers, and partly in connection with the house of John A. Hubbard, a large rice dealer in the city of New Orleans. Their relations with Hubbard were such that financial ruin to him meant ruin to them. Their close intercourse with this firm brought them to a knowledge in advance of the general public that it was on the eve of failure, and they at once set to work to prepare themselves against the coming storm. They accordingly, by a series of transactions closely following each other in date, and just prior to the announced failure of Hubbard

which followed, transferred all their property to different parties under acts purporting to be acts of sale. The transferees were all intimate friends of, and one of them a connection, by marriage, with the vendors. Gassin had been the overseer of the Viterbos for several years, and Reeves was the father-in-law of one of the partners. Both of these vendees claim to have been utterly ignorant and unsuspecting of any good reason why the defendants, who, according to the theory of the cases of the two intervenors, were in well-to-do, prosperous circumstances, should so suddenly and in the course of so short a time dispose of paying investments and valuable properties; and both seem to have come to terms of sale with a celerity not usual to men with the small means, which the testimony indicates them to have had, and with a confidence as to the precise objects bought existing at the moment of the sales, and the value of the same, rarely found in ordinary business transactions.

In the brief of the intervenors it is said, "While it is clear that Viterbo & Bros. were perpetrating a LEGAL fraud upon their creditors, still their intent, purpose, motive, and the fraudulent act are not binding upon either Gassin or Reeves, unless they were cognizant of or parties to it." We think the evidence in the case brings it, as against Gassin and Reeves, within this stated requirement. We are satisfied those parties were aware of what the defendants were attempting to do, and gave them their aid and assistance to effect that purpose. We are of the opinion that the two acts of sale are pure simulations.

Leon Viterbo announced to one of the witnesses several days before the acts were passed that he intended to do precisely what was done afterward, naming to him the very parties, but expressing some want of confidence as to whether Reeves was reliable and could be trusted.

The connection of Gassin with the pretended sale of the rice to him by Viterbo & Bros., which was disposed of by Ernst & Co., and his ignorance of what transpired subsequently to his pretended purchases, with respect to the things purchased, unmistakably show the want of reality in this whole transaction with him, and his thorough knowledge of the whole situation of the parties. We think it would serve no good purpose to go into details of testimony to show upon what our conclusions in this case rest. The relations of the parties to each other; the small means of the purchasers relatively to the

Dauterive vs. Opera House Association et als.

value of the things purchased; the suddenness of the proposition to sell and the celerity with which terms were fixed and sales made; the continued active interest by the vendors in the affairs of the vendees after the sales, and the correspondence of after occurring events with prior announced facts, are salient features of the case. We may say, also, that we are satisfied that Reeves was perfectly well informed as to the pretended sale made to Gassin simultaneously with that made to himself, and that it is impossible for him to have been in good faith in the premises, and we have no idea he would have been willing to have really risked a dollar of his own under the circumstances.

The jury drew a correct conclusion in respect to the purported sale to Gassin, but it erred in sustaining the sale to Reeves. We do not see on what ground they drew a distinction between the two cases.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the verdict of the jury, in so far as it was in favor of the intervenor, W. D. Reeves, be and the same is hereby set aside, as is that portion of the judgment based thereon, and it is now ordered that the demand in intervention of W. D. Reeves be and the same is hereby dismissed and rejected at his costs.

It is further ordered, adjudged and decreed that the judgment of the lower court dissolving the attachment sued on and executed against the property claimed by W. D. Reeves in the said intervention be and the same is hereby annulled, avoided and reversed, and the said attachment reinstated upon said property, and the said property be sold in due course of law to satisfy the judgment.

It is further ordered that the judgment appealed from be otherwise affirmed, costs of appeal to be borne by W. D. Reeves and U. R. Gassin.

No. 1467.

L. GASTON DAUTERIVE VS. OPERA HOUSE ASSOCIATION ET ALS.

46 1316
46 1479
46 1316
47 431

1. If, in answer to a petitory action, the defendant urges pleas of estoppel, and therein incorporates an exception of the want of proper parties defendant, which pleas and exceptions are repeated by warrantors when cited, it is better practice to refer same to the merits to stand as parts of the answers of the warrantors when filed. And this is particularly true when plaintiff, in his petition, has denied the existence of the facts on which the pleas of estoppel are founded, necessitating the administration of proof.

Dauterive vs. Opera House Association et als.

2. In a petitory action it is competent for the plaintiff to set up the *absolute nullity* of any antecedent judicial proceedings, with the view of disembarassing the title under which he asserts ownership of the property, without formally making the participants therein parties to the suit.

A clear distinction is taken between a petitory and revocatory action in this respect.

A PPEAL from the Nineteenth Judicial District Court, Parish of Iberia. *Voorhies, J.*

L. O. Hacker and Foster & Broussard Attorneys for Plaintiff and Appellant.

Walter J. Burke and Weeks & Weeks Attorneys for Defendants and Warrantors, Appellees.

The opinion of the court was delivered by

WATKINS, J. The averment of plaintiff's petition is, that he is the owner of an undivided one-third interest in a certain described lot of ground, with the improvements thereon, situated in the city of New Iberia, having a front of sixty-four (64) feet on the southwest side of Main street, with a depth of about one hundred and seventy (170) feet, bounded northwest or above by lot of Mrs. Widow Johnson, northeast by Main street, and southwest by property of the estate of William Robertson, deceased, or assigns.

That he acquired the ownership of said property by a donation *inter vivos* from Mrs. Joseph Dubuclet, plaintiff's great-grandmother, his brother and sister owning jointly with him one-third each, and petitioner specially disavows any title or claim of ownership thereof, as having been *derived by inheritance from his father or mother*, or from any other person whomsoever, same having been illegally disposed of by his father, B. D. Dauterive.

That he has never been divested of his right, title and interest, as above set forth, in the aforesaid property; and "that all proceedings by which it is claimed and pretended he has been (divested) are *absolutely null and void* and in no manner or sense binding on him."

That at the time it is claimed he was divested of ownership and possession of said property, by reason of certain illegal acts, he was a minor of tender years, and that the attempt to deprive him of his property, as well as the manner of doing same, were *absolutely null and void* for the following reasons, viz.:

Dauterive vs. Opera House Association et als.

1. Because the court in which all the proceedings were had was without jurisdiction *ratione materiæ et personæ*.

2. Because there never was legally appointed to him a tutor and under-tutor, and no law authorizing their appointment to be made while his father and mother were living.

3. Because the family meeting which advised the sale of the property in which he has an interest was null and void *ab initio*.

4. That the appointment of an under-tutor *ad hoc* who concurred in the recommendation of the family meeting was absolutely null and void, and his concurrence in no manner binding on his rights of property.

5. Because the family meeting in their *proces verbal* assign no reasons or necessity for the sale.

6. Because the application for the sale, and the order thereon based, was an attempt to defraud petitioner and deprive him of his property.

7. Because no party in interest demanded a partition.

8. Because the proceedings of the aforesaid family meeting were never legally homologated, the court being without jurisdiction to homologate same.

9. Because your petitioner being, at the time, a minor, was unrepresented in the proceedings purporting to divest him of his property.

10. Because the proceedings purporting to partition this property, in which he had an interest, were inaugurated under a law that had no application to the subject matter thereof.

Then follows this general sweeping allegation, viz.:

"Petitioner alleges that the orders of court, and all proceedings had in the premises, looking to the consummation of the same, by which it was attempted to deprive him of his property, are *absolutely null and void*, because your petitioner was not represented in any of them. * * * Because there was no necessity for the sale. * * * That the attempt to divest his title was unwarranted and illegal, and the result of a fraudulent conspiracy; and that he received no portion of the proceeds of sale—if any were paid."

He further avers that "all the nullities and defects above set forth are fundamental, absolute, radical nullities, and that he could not, by reason thereof, have been, nor was he divested of his title and ownership therein."

It is further averred that the aforesaid property is wrongfully and illegally in the possession of defendant as owner; and that its possession is and was *ab initio* in bad faith, entitling petitioner to rents and revenues at the rate of five dollars per month from ——— 1879, until the final determination of this suit.

His prayer is for citation and judgment in conformity to the foregoing allegations.

In limine the defendant excepted to the want of proper parties defendant, and prayed the suit be dismissed; and, reserving the benefit of its exceptions, it answers, averring that it is the legal and *bona fide* owner of the property by title translativo of property, and for a valuable and adequate consideration—setting forth the causes and circumstances of sale, and, amongst others, that the price was duly paid, and enured to the benefit of the plaintiff, who has, in this, and various other ways, ratified the same.

The plea of a want of a previous tender is urged. “Defendant avers that the plaintiff is estopped by word, deed, act and record from claiming the property in question in this suit, all of which estoppels defendant specially sets up in defence.”

He also pleads the prescription of one, four, five and ten years.

He further pleads and avers that, if any of the proceedings, judgments and transfers through which it claims be illegal or defective, and null, that any and all such illegalities, or nullities, are only relative, and can not be collaterally attacked, or brought into question, except by a direct action.

The defendant then alleged that it derived title from an association of persons, firms and corporations, composing the social person styled C. W. Georges & Co.—enumerating them individually and severally—by a written and duly recorded deed of sale, in 1888, which contained a stipulation of full warranty.

It shows that each and every one of the members of said association are the warrantors of its title to said property, and that it desires to call each of said persons in warranty, to defend this suit; and that it is entitled to have against each of said warrantors the same judgment that may be rendered against it, as defendant in this suit.

There is then a demand in reconvention, the specifications of which are, in substance, that there is now situated on said premises an opera-house building, and all the appurtenances thereto belong-

Dauterive vs. Opera House Association et als.

ing: such as fencing, outbuildings, walks, pipes, gas-fixtures, and other valuable and permanent improvements. That said building contains, in addition to the opera house proper, two stores and a hall, and that the cost of material and price of workmanship therein was thirty thousand dollars—same having been erected during the years 1887-88.

It is also averred that an annual expenditure of two hundred and fifty dollars is necessary for current repairs, and that the buildings have been kept regularly insured at a large cost annually, say three hundred and fifty dollars per annum.

That it has also been put to a large expense annually for taxes, say one hundred and fifty dollars per annum.

The averment is then made that in the event a judgment is rendered in plaintiff's favor, it is entitled to be reimbursed all of said values and expenditures; and judgment is prayed in reconvention for same, and defendant to be decreed entitled to retain possession until said reimbursement is made.

The prayer, in other respects, is in conformity to the foregoing averments of the defendant's answer.

Various parties who were called and cited in warranty made appearance for the sole purpose of excepting to the plaintiff's action, and, in various forms of phraseology, excepted, that the petition disclosed no cause of action; that they urged the various exceptions that are set out in defendant's answer; that the calls in warranty disclosed neither cause nor right of action, and that the plaintiff is estopped from asserting title to the property by deed, word and record.

Some of them specify a particular act as an estoppel and say "that plaintiff is more particularly estopped by the allegations and averments of a certain act passed before P. Laurent Renoudet on the 24th of March, 1890, wherein petitioner declares that the claims now set forth have long been settled between himself and *his father*, B. D. Dauterive, and to which act special reference is made for more particular specifications.

"And also by his appearance and declarations in acts of sale made by his father, B. D. Dauterive, and Enzelina Landry, on the 17th of June, 1890; and to Marie Estelle Rebbick, on the 28th of December, 1889."

Others specify plaintiff's acts of ratification and acquiescence in the

sale of the property to be his acceptance of the proceeds of sale and his authorization for the cancellation of a mortgage resting thereon in his favor and that of his co-owners.

On these cumulated, diverse and possibly conflicting exceptions, the cause went to trial, and from a judgment sustaining some of them, and dismissing his suit, the plaintiff has appealed.

It is manifest that this is a petitory action of ordinary form wherein the *absolute nullity* of various interfering judicial proceedings are averred, in order to brush them aside and remove them from further consideration.

As adjuvatory to this action petitioner alleges that at the time these judicial proceedings were inaugurated and consummated he was a minor and unrepresented. That he has, at no time, nor in any manner, recognized or acquiesced in said proceedings and sale; and that he did not receive any portion of the proceeds of sale. But, perhaps, the most striking and significant allegations of the petition are (1) that plaintiff acquired title by donation *inter vivos* from Mrs. Dubuclet, his great-grandmother; (2) that he specially disavows any title or claim of ownership of the property "as having been derived by inheritance from his *father or mother*, or any other person whomsoever."

It would appear that this averment had been made, *ex industria*, with a view of meeting and forestalling just the exceptions as have been interposed.

It is, further, of importance to consider the fact that the defendant—with whom alone the *plaintiff* deals in this court—is in court, on answer containing the broadest and most explicit response to the demands of the petition, and therein has incorporated the substance of all the various exceptions that were, subsequently, tendered by warrantors—the specific averment on the subject being "that the plaintiff is estopped by word, deed, act and record from claiming the property in question in this suit."

In this situation the question of difficulty presented to the judicial mind is the method by which these questions of estoppel can be segregated from the body of the case, already at issue by answer of the defendant, at the instance of warrantors subsequently appearing therein. Particularly in view of the fact that the plaintiff had previously disavowed, most specifically, all the acts and conduct on which the warrantors' pleas of estoppel are predicated.

Dauterive vs. Opera House Association et als.

An examination of the "reasons for judgment" which are assigned by the judge *a quo* clearly illustrates this difficulty; because they trenched largely on the *merits* of the cause—and necessarily so—in determining the exceptions.

We are clearly of the opinion that all these pleas of estoppel involve matters appertaining to the *merits* of the cause, and with which same are so commingled that a fair and intelligent decision of these can not be reached otherwise than on a trial of the *merits*, to which they ought to be referred, to stand as parts of the answer of warrantors.

But this ruling does not apply to the exception to the want of proper parties defendant.

In determining this exception it must be observed that plaintiff was particularly careful to state that all of the badges of nullity were *absolute* in character; while the defendant, joining issue on that question, affirmed that the alleged nullities were merely *relative*, and, consequently, the proceedings could not be *collaterally* attacked.

It is evident that in determining whether proper parties have been made, the allegations of the petition must be considered from the plaintiff's standpoint. If on the trial the fact is ascertained that the alleged nullities in the judicial proceedings adverted to are *not absolute* but *relative*, they will not avail the plaintiff, and he may, on that account, be driven to his revocatory action. But having pursued the petitory form of action, he was entitled to avail himself of any *absolute* nullity that he could point out as a means of disencumbering his title. A fair illustration of this practice is given in the case of Gravenburg vs. Bradford, 44 An. 400, and in discussing that question in that case we said:

"We take it to be clear and undoubted that this is a petitory action of ordinary form, in which it became necessary for the plaintiffs to set up the *absolute nullity* of the probate sale to Wedge of the Boisderé land claim in 1892, and the consequences flowing therefrom, in order to remove an apparent obstacle to their recovery of the property from Bradford, as Wedge's assignee of the land scrip, which he gave in exchange for patents.

"This is not, in any sense, an action of nullity or rescission, seeking the help of a judicial decree revoking a judicial sale. Such sale and proceedings are only *collaterally* drawn in question, and plaintiff's full reliance is placed upon the Boisderé succession records, to

Dauterive vs. Opera House Association et als.

exhibit and prove the want of jurisdiction of the Probate Court of Lafayette parish to grant the order of sale and the consequent nullity of Wedge's title to the land claim." *Belard vs. Gebelin*, 46 An. 326; *Bledsoe vs. Erwin*, 33 An. 618; *Walworth vs. Stevenson*, 24 An. 253.

So in the instant case the plaintiff's reliance is placed on the *absolute nullities* he has suggested in the judicial proceedings, which are collaterally drawn in question to show that his property was not alienated according to the forms prescribed by law.

The case relied upon by the defendant's counsel—*Heirs of Burney vs. Ludeling*, 41 An. 627—is not in point. That was a revocatory action, coupled with an action of revendication, and had for object the revocation and annulment of divers outstanding *mesne* conveyances, which intervened between the plaintiff's and defendant's title; and, in order to reach and recover the property, it was deemed necessary that same should be set aside. And, in order that this result be obtained, all the parties to the intervening titles were deemed and decided to be necessary parties to the suit. And such was our decision in that case.

We are of opinion that all necessary parties are before the court, and this exception must be overruled.

We observe that the District Judge, in passing on the exceptions, rendered judgment "rejecting finally (plaintiff's) demand and claim, and dismissing (his) suit;" that was error. The judgment must be reversed.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the exception as to want of proper parties be rejected, and that all of the pleas of estoppel be referred to the merits to stand as parts of the answers of warrantors when filed, and that the cause be reinstated and remanded for trial on the merits according to law and the views herein expressed, defendants and appellees to pay cost of appeal, those of the lower court to await final judgment therein.

Rehearing refused.

MR. JUSTICE BREAUX, being a party to the record, is recused.

Comeau vs. Miller.

No. 1463.

CLEOPHAS COMEAU VS. GOTTLIEB MILLER, MARY J. FISHER, THIRD
OPPONENT.

1. An order of appeal may be taken at any time within one year, to be computed from the day on which final judgment is rendered, but the appellant must file the transcript in the court of appeal on the return day of the appeal.
2. The surviving widow in necessitous circumstances may urge her preference claim for one thousand dollars by way of third opposition to executory proceedings by one of her deceased husband's special mortgage creditors—the death having supervened pending the sale of the property.
3. The court having granted an order directing the sheriff to withhold from the proceeds of sale a sufficient amount to cover opponent's demand, her privilege may be executed against same after the sale is made—her privilege being transferred to the proceeds of sale.
4. A mere paper assignment by third opponent of her homestead claim to her husband's seizing creditor, without any consideration, is a nullity, and can not found any rights in his favor, and can not exclude the assertion of her rights afterward.
5. The waiver or renunciation of a homestead claim, it being a provision of law in favor of the destitute, is against public policy.

A PPEAL from the Eleventh Judicial District Court, Parish of Acadia. *Chappuis, J. ad hoc.*

H. L. Garland for the Succession of Comeau, Appellant.

Edw. L. Wells for Third Opponent, Appellee.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The ground of appellee's motion is, that appellant has been guilty of *laches* in bringing up the appeal, not having filed the transcript of appeal in this court within one year next succeeding the signing of the judgment appealed from. Hence her averment is that the plaintiff's right of appeal lapsed. The record shows that the judgment was signed on the 16th of June, 1893, and that the transcript was filed in this court on the 3d of July, 1894—more than twelve months intervening between those two dates.

But in this case the judgment of the District Court did not become final until the date of the adjournment of the term on the 26th of June, 1893, and the appeal was taken by petition and citation, the

Comeau vs Miller.

judge's order having been granted on the 3d of July, 1893, making the appeal returnable to this court on the first Monday of July, 1894, and the service of the citation of appeal having been made on the 4th day of May, 1894. It was permissible for the court to fix the return day as he did (C. P. 583); and the *order* of appeal having been granted within one year, "computed from the day on which final judgment was rendered" (C. P. 593), it was timely.

These rules do not, however, appertain to the mode or time of lodging the transcript of appeal in this court, for the rule of law is that "the appellant must return the said petition of appeal and the *transcript* of the proceedings *into the court of appeal* on the return day thereof." C. P. 587.

The appellant has complied with the law in bringing up and filing the transcript. There is, therefore, no merit in the defendants' motion and it is denied.

ON THE MERITS.

Plaintiff's counsel state her claim thus:

Cleophas Comeau, the mortgage creditor of Gottlieb Miller, instituted executory proceedings against the property mortgaged, and during the pendency of those proceedings and before sale the debtor died. Thereafter the widow of deceased was made a party thereto, and the sale proceedings continued against her.

On the day of sale the widow filed a third opposition claiming a privilege superior in rank to that of the seizing creditor, securing her claim for one thousand dollars as the surviving widow of the deceased, in necessitous circumstances and entitled to be paid from the proceeds of sale, in preference to the seizing creditor.

To this third opposition several exceptions were filed on the part of Eliza Roy, the surviving widow of Comeau—who had in the meanwhile departed this life—(1) no cause of action against the proceeds of sale in the sheriff's hands; (2) that third opponent has disposed of her rights, as widow in necessitous circumstances, by a formal written act, of date December 23, 1891, and same is a complete bar to her recovery thereof; (3) that third opponent has, since the death of her husband, appropriated and disposed of the effects of his estate, and same constitutes a further bar to the assertion of her claim.

Contemporaneously therewith third opponent entered a special

Comeau vs. Miller.

plea to the effect that she was altogether ignorant of any such document; but averring that if any such paper existed as imported a relinquishment of her homestead that same was executed and signed by her through error of fact and law, and that same was obtained by fraudulent representations of Comeau to the effect that it was for her own benefit, she being at the time completely under his influence and control; that she never received any consideration therefor, and that same is null and void; and she prays to be relieved from its effects, as a fraud practised upon her.

(a) The record shows that on the filing of the third opposition an order was made directing the sheriff to retain in his hands, out of the proceeds of the sale of the property mortgaged, the sum of one thousand two hundred dollars to await the further order of the court in the premises. The seizure and sale against which this opposition was directed was based on an ordinary conventional mortgage, securing the payment of a promissory note of Miller for the sum of seven hundred dollars, dated June 12, 1885, and due on demand; and a similar note for one thousand one hundred and fifty dollars and seven cents dated October 5, 1839, and due at one day after date. But the act of mortgage contained the stipulation of no vendor's lien.

Under those executory proceedings Comeau became the adjudicatee of the mortgaged property on the 19th of December, 1891, and, under a written agreement between him and third opponent, he retained in his hands the one thousand two hundred dollars specified in the order of court, instead of making a deposit with the sheriff.

On the 23d of December, 1891—only a few days after his purchase at sheriff's sale—Comeau conveys the same property to third opponent and Miss Mary Fisher—"to each an undivided one-half"—on the following terms and considerations, to-wit:

"Mrs. Miller to pay for her undivided one-half interest in said property the sum of one thousand five hundred and sixty dollars, as follows, viz.: The sum of five hundred and sixty dollars, payable in twelve months from date, and one thousand dollars payable in one, two and three years from date, with eight per cent. interest from maturity, for which amounts notes are given as hereinafter set forth, payable to the vendor's order and secured as hereinafter provided. Miss Fisher is to pay for her share of the property the sum of one thousand dollars, payable in one, two and three years," for which she was to execute her notes secured by mortgage.

From the foregoing it is quite clear that third opponent's claim was good in law, on the face of the papers, because the act of mortgage which was the subject of the executory proceedings contained no vendor's lien, and her claim arose at the death of her husband pending the sale. The order of court directing the retention of the sum of twelve hundred dollars preserved her rights, and it was perfectly competent for the third opponent to consent for the mortgage creditor to retain the fund in his hands pending her opposition.

Such an agreement was recently recognized and enforced in the case of *Bourgeois vs. Octave Jacobs*, 45 An. 1310.

(b) The agreement of December 23, 1891, which is relied upon as showing that the third opponent parted with all of her rights as widow in necessitous circumstances, is unique and exceptional. It contains the following significant recital, viz.:

"Whereas, in executory proceedings of *C. Comeau vs. Gottlieb Miller*, her deceased husband, she has filed a third opposition claiming the widow's homestead of one thousand dollars in preference to all creditors; * * * and whereas, said Comeau has sold to her the undivided one-half of the property seized and sold in said proceedings, for the price and sum of one thousand five hundred and sixty dollars, payable as above recited; and whereas, the *price, terms and conditions aforesaid are a great advantage to her, in consideration thereof* she hereby agrees and consents to assign, and by these presents does transfer and assign to said Comeaux any and all amounts of money which she may be adjudged to be entitled to in virtue of her said third opposition."

Bearing in mind the fact that Comeau conveyed to Miss Mary Fisher one-half interest in the land for the price of one thousand dollars, and to third opponent the other half interest for the sum of one thousand five hundred and sixty dollars, it is difficult to appreciate "the great advantage" for which she agreed, *on the self-same day*, to assign to Comeau her right to the one thousand dollars actually in his hands. Or, in other words, the third opponent having already paid, in notes, five hundred and sixty dollars more than her sister, for exactly the same quantity of land, she was so much favored by the operation that she voluntarily consented to relinquish one thousand dollars more. At that rate, the third opponent actually paid two thousand five hundred and sixty dollars, as against Miss

Comeau vs. Miller.

Fisher's payment of one thousand dollars. And in order to demonstrate that the one thousand five hundred and sixty dollars was a real and actual consideration for the land, the record attests that scarcely had one twelvemonth rolled by when the executrix of Comeau's estate obtained an order of seizure and sale on the two notes first maturing and sent her half interest to sale. We are thus enabled to see and appreciate "the great advantage" Mrs. Miller enjoyed in this transaction.

It is perfectly apparent that she did not receive one dollar in the way of consideration for the valuable right she apparently assigned to Comeau.

In treating of this question the District Judge says:

"The evidence satisfies the court that the plaintiff"—i. e., the third opponent—"although a woman of ordinary intelligence, had unlimited confidence in Comeau, who possessed over her an influence which was calculated to cause her to abandon any and all rights which she might have at his simple bidding, or upon his representation that such a course was the best. The plaintiff swears that for many years neither she nor her husband conducted any business transaction or venture without the advice and counsel of Comeau. That prior to the sale of Pointe Aux Loupe Springs property, and since, Comeau always promised her that he would see to it that her claim for one thousand dollars, as widow in necessitous circumstances, should be secured to her, and that she relied, implicitly, upon his statements. That, at first, she had no attorney, because Comeau told her that she did not need one—that he and his attorneys would attend to the matter for her.

"The court is also satisfied that the plaintiff never appreciated the effect of the act of renunciation of December, 1893, and that she signed the same upon the representations and promises made to her by Comeau.

* * * * *

"But admitting that this renunciation was executed by Mrs. Miller, of her own free will and accord, and that she thoroughly understood its import, it is evident that it was made without consideration. She swears absolutely that she never received anything for her signature."

For these reasons, amongst others, the District Judge overruled this exception, and our examination of the evidence has led us to the same conclusion.

Nor is this the true theory of the case in point of *fact*, but it is equally true in point of *law*; for this court recently decided that "the widow's and minor's portion, under Act March 17, 1852, is a provision for the destitute and can not be waived in favor of a creditor," etc. Succession of Waddell, 44 An. 361.

Such a waiver or renunciation on the part of a *destitute* widow can not be readily presumed, and it is manifestly against public policy.

(c) With regard to the third exception we deem it sufficient to say that if the third opponent has appropriated and used any portion of the effects of the community since her husband's death, that does not have the effect of an estoppel against her entire claim, but the value of such effects will be ascertained and credited against her on settlement.

All of the defendant's exceptions having been overruled, he filed an answer pleading a general denial, accompanied by the following special defences, viz.:

1. That as Comeau is a creditor possessing the security of a vendor's lien, he is entitled to be paid out of the proceeds of the sale of the property by preference.

2. That third opponent's indebtedness to the estate of Miller amounts to one thousand five hundred and sixty dollars for the price of land sold to her, and she should be made to pay that amount before receiving any part of the one thousand dollars held in reserve under the order of the court.

As has already been shown neither of these defences are good, first, because the mortgage under which the *first* executory proceedings sent the land to sale contained no vendor's lien, and the second was predicated on a conventional sale made to third opponent and Mrs. Fisher, *long subsequent* to the death of her husband and the acquisition of her right to a homestead.

And, in addition to this, the executrix of Comeau became the adjudicatee under the second seizure and sale, and the price yielded thereby was very nearly sufficient to discharge all the notes of the third opponent.

In summing up the evidence on the merits of the case the District Judge found that the "evidence shows conclusively that at the time of the death of third opponent's husband (she) was in necessitous circumstances, and that beyond the judgment obtained against her husband by Black for the recovery of the purchase price of furniture,

Comeau vs. Miller.

which judgment was transferred to her by him, she had no property. Mrs. Miller swears that at the time of her husband's death the furniture sold by Black was worth forty-eight dollars, and that she has been using same since her husband's death. The court is of opinion that she should be charged with the value of it at the time of his death.

* * * * *

"It is also in proof that Mrs. Miller has collected, since the death of her husband, money due his estate amounting to fifty-four dollars and eighty-five cents * * * and consequently she should be charged with that amount also. The court therefore finds that the third opponent is entitled to receive from the succession of her husband the sum of eight hundred and ninety-seven dollars and fifteen cents, which, added to the total credits of one hundred and two dollars and eighty-five cents—the amount of her means at the time of her husband's death—make up the total of one thousand dollars," etc., to which allowance she is entitled to receive as widow in necessitous circumstances.

We have examined the record and scanned the testimony of all the witnesses with great care, and feel satisfied that the opinion of the judge *a quo* is correct.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

WATKINS, J. On careful re-examination of the earnest application for rehearing, the views entertained in our original opinion are confirmed.

(a) While it is true that, in satisfaction of the two notes described in our opinion, Miller made a *dation* to Comeau, and on the same date Comeau conveyed to Miller, on terms of credit, retaining a vendor's lien; and that it is true that said *dation* and sale were subsequently revoked at the suit of Adler, a creditor of Miller, the effect of which was that said *dation* and sale were unaffected as to other creditors of Miller; yet it is equally true that Comeau *acquiesced* in the annulment of the *dation* and sale, and proceeded to foreclose his original mortgage, apparently on the theory that same had revived and become exigible again. In thus proceeding he evidently abandoned Miller's *dation* to him in *satisfaction of said notes as the consideration thereof*, and his title thereunder, which was the foundation of his sale to Miller.

Comeau vs. Miller.

Certainly the two transactions could not and did coexist.

The *dation*, if maintained, settled the original notes and mortgage. If the sale of Comeau to Miller, containing the vendor's lien, is maintained, the original notes and mortgage have no existence. But if the original notes and mortgage still exist, and are enforceable, the *dation* and subsequent sale must have passed out of existence. But the estate of Comeau, having obtained executory process on the *original notes and mortgage*, and sent the property to sale thereunder, and become the adjudicatee, is conclusively presumed to have abandoned the *dation* and sale thereunder to Miller.

While these executory proceedings were in progress—possibly on the very day of sale—Mrs. Miller set up her homestead privilege, ranking the Comeau mortgage. In this emergency, claim is made under the *dation* of Miller to Comeau, and the sale on the same day from Comeau to Miller—the latter containing a vendor's lien—notwithstanding the previous abandonment of it.

It is impossible to conceive in what way the vendor's lien in the *last* act to Miller can be imported into the *first* act, on which the seizure and sale opposed was predicated. To do this would be to give effect to the *two* series of notes of Miller, and enforce *two* special mortgages, of wholly different dates and tenor, under a *single* order of seizure, in which the latter is not mentioned; and in spite of the fact that Comeau surrendered the first notes to Miller, as the consideration of the *dation*, and sold the property to Miller in consideration of the last ones.

It was on this theory that we did not treat this question in our original opinion, and considering that Adler's claim against Miller was ranked by the homestead claim *subsequently* arisen, it was equally unnecessary that it should be discussed.

(b) We have noticed the argument of Comeau's counsel in respect to Mrs. Miller's claim only bearing a general privilege. But that does not seem important, in view of the fact that its rank is superior to all others, except the vendor's lien, and the expenses of selling the property. Under the circumstances of this case, we are of opinion that the widow in necessitous circumstances can not be turned around to another action, or to some other possible source, for satisfaction of her demands. It was clearly the right of Comeau to have provoked an administration of the succession of Miller, and thus produced a *concursus* for the benefit of all concerned. This,

State vs. Taylor.

Mrs. Miller could not have done effectually, because she could not have prevented the executory proceedings of Comeau, and would have been driven to an opposition at last in order to recover the proceeds of sale, just as she has done. *Qui bono?*

(c) We have also given due attention to the argument of Comeau's counsel, to the effect that the widow should have demanded payment of the *heirs* of the deceased. Under the evidence in the record this would have been an idle ceremony, and totally unavailing. Miller died utterly insolvent, and there is no proof that he left any heirs at his death. Certainly there were none who have hazarded the consequences of a *simple* and *unconditional* acceptance of his insolvent estate. Consequently there were no heirs on whom she could have called.

We are of opinion that the case has been correctly decided.
Rehearing refused.

No. 1458.

STATE OF LOUISIANA VS. E. R. TAYLOR.

The defendant was indicted for forgery.

He signed the names of a number of drawers to a note, and signed an *addendum* to the note that he was their authorized agent.

In a prosecution for forgery the defendant can not be convicted of having falsely assumed to act as agent.

The instrument appears on its face to have been executed by an authorized agent, the defendant; an apparent agent is not guilty of forgery though he had no authority in fact.

A PPEAL from the Tenth Judicial District Court, Parish of Natchitoches. *Andrews, J.*

Phanor Breazeale, District Attorney, for the State, Appellant.

Pierson & Porter Attorneys for Defendant and Appellee.

The opinion of the court was delivered by

BREAUX, J. The defendant was indicted for forgery. The note he is charged with having forged reads:

"\$69.38. On or by the 16th day of November next, we, or either

State vs. Taylor.

of us, promise to pay J. P. Readhiner, or bearer, the sum of sixty-nine dollars and thirty-eight cents for value received of him, bearing eight per cent. from date till paid.

"This, February 3, 1890: Henry Weber, Boston Thomas, Adolphus Taylor, Mason Ray, Mat Beavers, Jr., Mat Beavers, Sr., Anderson Forley, Joe Forley, Jr., E. R. Taylor, J. R. Weaver.

"I was authorized to sign the above names. I secured the order.

"E. R. TAYLOR."

He moved to quash the indictment, on the ground that the facts charged do not constitute the crime of forgery.

This motion was sustained by the District Court.

From the order quashing the indictment the State appealed.

Without brief or oral argument the appeal was submitted for decision.

The defendant is charged with having made an instrument purporting to be a note signed by a number of persons.

The facts, as charged, are that he executed an instrument purporting on its face to be executed by him as agent.

Assuming that the facts are correctly charged, forgery is not the crime the defendant has committed.

Forgery is defined as the making or altering of a writing so as to make the alteration purport to be the act of another person.

This definition does not embrace the making of a note per procuration of the party whom he intends to represent. The false assumption of authority is not the forgery denounced by the statute, and by falsely assuming to act as agent the maker of the instrument does not make the alteration purport to be the act of another. It is his own unauthorized and wrongful act, and not the fraudulent falsifying of another's name, as in forgery.

It was not a false making of another's signature. It did not purport to be the signatures of the drawers personally, but their signatures as written by the defendant acting as an agent.

He did not personate others and fraudulently write their names, but stated on the face of the instrument that he was an authorized agent.

This did not constitute forgery, though he may have had no authority in fact.

The agency expressed takes the instrument out of the category of false making in the sense of forgery.

Bloch vs. Creditors.

Mr. Wharton, in his works on Criminal Law, Vol. 1, p. 668, 8th Ed., says: "That to sign the name of another, without authority, is forgery when similitude is attempted."

There was no attempt made to imitate the signatures of the drawers or to impose by attempting to create the impression that they had signed. To constitute the offence there must be some attempt made to imitate a genuine instrument and the writing falsely made must purport to be the writing of another.

These elements of forgery are not proved by the instrument copied in the indictment.

From Archbold's, Vol. 11, p. 819, we quote as pertinent:

"If a man draw, accept or endorse a bill of exchange in the name of another, without his authority, it is forgery. But if he sign it with his own name per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely a false assumption of authority."

Mr. Bishop, in his Criminal Law, Vol. 2, p. 582, is equally clear and positive that "endorsing a bill of exchange, under a false assumption of authority to indorse it per procuration is not forgery, there being no false making."

The crime charged was false making and forgery.

The facts upon which the charge is based do not support the indictment.

In fine, we are persuaded, after an examination of a number of authorities, that an instrument which shows on its face that the person signed as agent of the drawer of a note can not be the subject of forgery.

The act has not one of the essentials of the crime of forgery—a false writing of an instrument apparently genuine.

The falsehood, if there is falsehood, is in the agency, in omissions to act as agent and not in forging an instrument.

It is therefore ordered, adjudged and decreed that the judgment appealed from quashing the indictment be affirmed.

No. 1472.

JOSEPH BLOCH vs. HIS CREDITORS.

When the verdict is defective in point of form, because it does not expressly pass upon the plaintiffs' claim, but on the reconventional demand for a sum, that

Bloch vs. Creditors.

presumably was found for defendant after having considered plaintiffs' demand, the case will not be remanded by this court, who will render such judgment as should have been rendered by the jury.

The plaintiffs, third persons, and holders of a draft before maturity, are not bound by the acts of their transferrors after the transfer.

The intent to defraud must be established to justify an attachment.

The attachment was not actuated by malice. Only actual damages are allowed.

The rule to annul the respite is dismissed, reserving to the plaintiff his rights in further proceedings to be instituted under the judgment.

Defendant's reconventional demand being offset by the main action, and a judgment recovered by plaintiff for a balance proved; judgment includes costs.

A PPEAL from the Thirteenth Judicial District Court, Parish of St. Landry. *Perrault, J.*

Thos. H. Lewis and Estilette & Dupre Attorneys for Plaintiffs and Appellants.

H. L. Garland, C. F. Garland and Kenneth Baillio Attorneys for Defendants and Appellees.

The opinion of the court was delivered by

BREAUX, J. The St. Louis National Bank, a creditor of the defendant, sued him on 7th March, 1890, for the sum of twelve hundred and seventeen dollars and ninety-seven cents and interest.

As a basis for a writ of attachment the plaintiff bank alleged that the defendant had suspended payment and was in failing circumstances; that he continued from day to day to sell his goods for cash and to collect amounts due him, to place it beyond the reach of his creditors; that in order to gain time and deceive his creditors he issued a circular to them, exaggerating the quantity and value of his assets, and asking for an extension within which to pay, well knowing that it was impossible for him to pay with his visible assets, and that he was aware that the delay would not be granted because he made his proposition conditional upon the unanimous acceptance by all of his creditors, a remote contingency, creating the belief that his circular was a mere subterfuge to stand off his creditors while he was turning his goods into cash in order to defraud them.

The plaintiff further alleged that the defendant had failed to all intents and purposes, and would have made a cession of his property if he had intended dealing fairly; that he had failed several times and settled his liability at heavy discount.

Bloch vs. Creditors.

In his answer the defendant claimed to have settled his indebtedness by giving a draft to the plaintiff in satisfaction of the draft the plaintiff held.

With reference to the attachment, he denied the truth of plaintiff's allegations; he also denied his alleged insolvency, though admitting temporary embarrassment, and specially alleged that since January, 1890, he had been negotiating with his creditors for an extension of time, and had secured the consent of over three-fourths in number and amount, to such extension; he specially denied making use of such delay to defraud his creditors, or having made false or unfair statements to them, and averred that he had conducted his business in the usual manner, saving that he suspended payments temporarily while waiting the answer of his creditors to his application for extension.

He charges that the attachment was wanton, malicious, and without probable cause, and reconvenes for damages in the sum of thirty-nine thousand and thirty-seven dollars and forty-one cents.

Subsequently the defendant, Bloch, obtained a respite of one, two and three years.

His schedule of assets and liabilities, upon which he obtained the respite, was filed June 16, 1890.

The plaintiff, in the respite proceedings, required of the defendant, Bloch, the execution of a bond and security for its claim.

The bond having been executed and instalment matured, the plaintiff sued out a rule upon the defendant to show cause why the respite should not be set aside and annulled, because of the non-payment of the bond.

In this answer, to this rule, the defendant denies his indebtedness and avers that the plaintiff bank owes him a large sum, for which he had instituted suit.

On his motion the two suits, the respite proceedings and the suit of the plaintiff bank, against him, were consolidated.

The case was tried by jury. They returned a verdict for the defendant for seven thousand dollars. The plaintiff appeals. It is in place to state that, preliminarily, before this court, the plaintiff bank complains of the form of the verdict and judgment and asks that the case be remanded for another trial for the reason that the verdict is not responsive to the pleadings, not having passed upon the merits. Plaintiff invokes the article of the Code of Practice in

which it is laid down that the jury should pass, at one and the same time, upon the main and reconventional demands.

The jury has not in terms rejected plaintiff's demand.

Either they rejected plaintiff's demand entirely, or they compensated the two claims and rendered judgment for the balance they found due to the defendant.

This question was considered in *Miller, Lyon & Co. vs. Ceppel et al.*, 39 An. 882, and the court held that, being in possession of all the facts and evidence necessary to pronounce judgment in the case, it would proceed to render such judgment as should have been rendered in the court below, regardless of the defective verdict.

The same principle was laid down recently in *State of Louisiana vs. Cannon, Sheriff*, 44 An. 734.

The verdict of the jury expresses a balance due, and, from the conclusion reached, it was useless for them to pass upon the application to annul and set aside the respite.

Manifestly the jury found that there was no ground to annul and set it aside, the order of respite having determined that the plaintiff was not entitled to anything, and therefore without concern in the respite proceedings, not being, from their point of view, entitled to anything.

This conclusion brings us to the consideration of plaintiff's claim; as it was never seriously disputed by the defendant, and is supported by the evidence, it must be pronounced due.

Without denying the indebtedness, the defendant urged that it had changed form and secured him some delay for payment.

This draft was drawn by the Freeman Wire and Iron Company, of St. Louis, upon defendant Bloch, and it was by him accepted.

At maturity it was sent to Opelousas for collection. The acceptor, the defendant contends, settled this indebtedness by giving another draft in payment in accordance with an agreement with the Freeman Wire and Iron Company.

This company had transferred the first and accepted draft to the plaintiff for valid consideration. No agreement of these parties—i. e., between Freeman Wire and Iron Company and the defendant, could affect their (plaintiffs') interest, as they were the holders and owners in good faith, prior to maturity.

The draft had passed out of the hands of the payees, and was legally held by the plaintiffs.

Bloch vs. Creditors.

THE DISSOLVED ATTACHMENT.

The plaintiffs contends that the facts sustain their writ of attachment. The defendant with much earnestness and emphasis denies the charges upon which the writ is based, and controverts plaintiffs' inferences regarding certain business transactions of the defendant.

The balance of the evidence regarding the insolvency alleged support the conclusion that the defendant was not insolvent at the time that the attachment issued; his embarrassment as a debtor was not the less great, and rendered it impossible for him to meet his maturing obligations.

The attempted suspension of payment and the written notice addressed to each creditor informing him, a few weeks prior to the attachment, that short crops and other causes stated occasioned him to sustain heavy losses in his sales of merchandise, his collections and in his purchases of rice, and that while he had ample means in property enumerated he was compelled, with great reluctance, to suspend payment for the present and ask indulgence, and the proposal to pay in three stated instalments if all his creditors would agree, was not, of itself, a fraud upon his creditors. It was not binding upon the creditors, and was merely a request for delay.

It is probable that it seriously affected his credit and proved highly damaging to his business, but it was not a ground for attachment; unconnected with other acts showing a design to enrich himself at the expense of his creditors, it does not give rise to the inference that a wrong was intended justifying a writ of attachment. There is no evidence showing that the defendant was at any time prior to the attachment, and at the date of the notice to the creditors, selling his goods at or below cost.

We will not dwell upon the acts of the embarrassed debtor, who in his nervous anxiety to escape from ruin and want, commits indiscretion and suffers losses cool reflection will avoid.

If these acts preceding the attachment stand alone, unconnected with any subsequent agreement or attempts to take undue advantage of creditors, they do not of themselves support an attachment. They will only have contributed to defendant's loss and damage without, so far as the evidence discloses, giving good ground for an attachment.

Our attention has been arrested by the report of a committee,

Bloch vs. Creditors.

bearing date March 22, 1890, recommending a settlement with the defendant at fifty cents on the dollar, cash.

This of itself has no special significance. Creditors generously abandon a part of their claims in order that the unfortunate debtor may free himself from a part of his indebtedness and be enabled to pay the remainder and uphold a place among merchants.

It is urged that there were favored creditors who were paid in full, though they had signed an agreement to receive only half in satisfaction of their claims, while others less fortunate received only fifty cents on the dollar, ostensibly the proposition to all, but from the effects of which the favored were excluded *sub umbra*, for the benefit of their influence in carrying out the compromise.

The determination of the issues on this point has been attended with some difficulty, it being established that such payments were made and color thereby given for the charge.

Our examination convinces us that the balance of the evidence is in favor of the position that there was no downright unfair dealing.

We have already seen that the defendant made an application for an extension of time prior to the attachment. At a meeting of his creditors held after the attachment had been made to consider his application he explained the condition of his business, and gave an account of his assets and liabilities. He represented himself as being solvent. His statements at the meeting are commented upon by the witnesses as having been fair and truthful.

A committee of creditors appointed by the creditors at a subsequent meeting made a report, and advised a compromise at fifty cents on the dollar in lieu of an extension. This recommendation was favorably received. For reasons not fully explained this compromise was not carried out, and the debtor resorted to other measures to settle his financial difficulties. He applied to the courts and obtained a respite. The records do not disclose that the debtor took any part or made any suggestion to influence the creditors. They, through their committee, made the offer, which was, it seems, accepted, but for some reasons, of which no one at the time complained, it was abandoned.

Subsequently the debtor, owing doubtless to the respite and the unsettled condition of his affairs, succeeded in paying a number of claims at a discount. The proof is that these payments were made without reference to the agreement entered into at the meeting of

Bloch vs. Creditors.

creditors; it appears that many creditors preferred the cash, while others trusted to the ultimate ability of the defendant to pay the whole amount of their claims.

Beyond the fact that certain creditors were paid less than the face value of their claims, there is no evidence that advantage was taken. In the absence of testimony, we will not assume that these creditors were controlled by improper influences and representations in the face of the positive uncontradicted declaration of a number of witnesses to the contrary.

The verdict of the jury and the judgment of the court dissolving the attachment were, therefore, correctly rendered and will remain undisturbed.

DAMAGES.

The reconventional demand presents serious grounds for determination. The defendant has filed a large claim for damages, which met the jury's favorable consideration, to an amount to which we can not give our approval.

We must consider, in determining the question of damages, that the defendant announced to his creditors that he had suspended payment, and at the same time continued to sell his goods and realize from his sales in business. These acts are entirely unusual and extraordinarily exceptional.

He applied for an extension of time to pay.

This was followed by meetings, at which it was determined to accept fifty cents on the dollar on his indebtedness.

Respite proceedings were resorted to and a respite obtained on an order of court.

In defence of other suits instituted about the same time, in which attachments were levied, these large claims for damages were abandoned for very limited consideration.

In one of these cases plaintiff's claim was small—some two hundred and fifty dollars.

The defendant in his reconventional demand prayed for the damages he claims in this suit. Subsequently a compromise was effected, in which he abandoned his claim for damages on plaintiffs' receipt for the amount of his claim.

These large claims for damages are based principally on defendant's alleged loss of credit and confidence, occasioned by plaintiff's attachment proceedings.

Bloch vs. Creditors.

We do not feel certain that they are the cause or that they materially contributed to defendant's loss of credit and business.

His own acts seriously affected his business to a degree rendering it impossible to find damages to his credit and standing from other causes. We must eliminate from the demand in reconvention all claims based on alleged loss of credit or loss of business.

They are hypothetical at best and not the immediate consequence of the attachment. We do not trace them with sufficient certainty to ground a judgment.

Assessing only actual damages arising directly from the attachment, we think that the defendant has a right to counsel fee for dissolving the attachment. A practising member of the bar testified that two hundred and fifty dollars would be a fair compensation. No good reason suggests itself to disregard this estimate.

The defendant claims for loss and deterioration in his goods, while under seizure, the sum of six hundred and twenty-three dollars and four cents. This item is supported by testimony, and he is justly entitled to the amount.

This ends the list of damages allowed. We can not reconcile ourselves to the assessment of a larger amount for annoyances, trouble, worry, mortification, injury to feelings, for loss in sale of goods and profits. They are problematical and unusually uncertain in this case as elements of damages chargeable to plaintiff.

With reference to the rule to set aside the respite, consolidated with the principal case, the changes that have taken place in this protracted litigation require that the question be not finally decided at this time and in the suit at bar.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that plaintiff recover judgment against the defendant for the sum of twelve hundred and seventeen dollars and ninety-seven cents, with eight per cent per annum from the 24th of February, 1890, until paid.

It is further ordered, adjudged and decreed that defendant have judgment on his reconventional demand against the plaintiff in the sum of eight hundred and seventy-three dollars and four cents, with legal interest from date of this judgment.

The defendant to pay costs.

It is further ordered, adjudged and decreed that the writ of at-

Bloch vs. Creditors.

tachment be dissolved and set aside, the costs of attachment and of seizure under the attachment to be paid by plaintiff.

It is further ordered, adjudged and decreed that the rule upon the defendant to show cause why the respite of one, two and three years granted by his creditors should not be set aside and annulled because of non-payment of the bond be dismissed as in case of non-suit at cost of plaintiff in rule.

The defendant and appellee to pay the costs of appeal.

ON APPLICATION FOR REHEARING.

MILLER, J. The argument on the part of the plaintiff in support of the attachment is in great part addressed to the suspension of payment of the debtor, which, with other circumstances, is supposed to afford a basis for the attachment. Nothing is better settled than that attachments are *stricti juris*. Until the act of 1868 the causes to authorize the writ were restricted to non-resident debtors, or the debtor about to absent himself permanently, or concealing himself to avoid citation. The act of 1868, now part of Art. 240, C. P., supplied the causes for the writ when the debtor has mortgaged, assigned or disposed of his property, or is about to mortgage, assign, or dispose of his property with intent to defraud creditors, or give unfair preferences, or when he has converted or is about to convert his property into money or evidences of debt with intent to place it beyond the reach of his creditors. The affidavit in this case for the attachment was made under that portion of the article embodied in it from the act of 1868, substantially charging the defendant with converting his property into cash with the design of defrauding his creditors. The prominent question in the case, of course, is as to the right to attach.

It is to be accepted that while the affidavit calls on the defendant for some *prima facie* proof to negative the fraudulent design to him, whenever that proof is given the burden is on plaintiff to sustain the affidavit. 9 Rob. 90. There is another rule equally well settled in the administration of the proof required of the plaintiff in support of the burden the law casts on him. He must refer to the state of facts existing when he issues the writ, for it is on the then existing condition the creditor bases his affidavit. Now, with these rules in view, on what basis did this writ issue? The debtor had suspended payment, announced his inability to pay his debts and solicited an

Bloch vs. Creditors.

extension of time. He continued his business and was selling in the usual course. If to this is added the circumstance that he had ordered and received the plaintiff's merchandise about a month before his proposition to his creditors, and the fact that his proposition for an extension was conditioned on the acceptance of all his creditors to be binding on any, we have the condition of facts on which plaintiffs based their oath that defendant was fraudulently converting his property. It is true that on this branch of the case we have supplemented the discussions in plaintiff's brief of asserted dishonest failures of the defendant years ago, which it can hardly be seriously contended can afford any aid in the solution of the question before us.

As we appreciate the argument of plaintiff's counsel, it is substantially that a debtor's announced failure to pay, with his actual suspension and the continued sale of his goods without any surrender of his property, authorizes an attachment of his property. This argument might have weight addressed to the legislative department, but surely can not prevail with the court charged only with the application of the laws on the statute book. It said that suspension is failure in the ordinary and legal sense, yet failure wherever it occurs in the Code means a surrender. See elaborate discussions in *Citizens Bank vs. Seixas, Syndic*, 38 An. 424. Again it is urged that under the Code of Practice one who has petitioned for stay of proceedings and a meeting of his creditors may be subjected to the writ of sequestration when it is feared that availing of the stay he will place his property beyond the reach of his creditors. But defendant did not apply for the benefit of the insolvent laws, and because the law authorizes a sequestration in the given case it does not sanction an attachment in the case here. The law in the case of the debtor who suspends payment of his debts, but does not surrender his property, leaves his creditors the usual remedy of suit, judgment and execution, or the remedy to compel a surrender and an attachment if the debtor commits any of the acts of fraud specified in the Code. We can not, therefore, assent to the proposition that suspension of payment is failure in the sense of the Code, or that failure merely, whether in the legal or popular sense, authorizes the writ of attachment; or that suspension, not followed by a surrender, the debtor proposing a compromise not acceded to and continuing his business as usual, affords a basis for the writ. The attach-

Bloch vs. Creditors.

ment is permitted only when there are the specific acts of fraud or manifesting the fraudulent intent expressed in the act of 1868. Our courts have constantly held that attachments of this character must have the basis of some act of the debtor, clearly bringing him within the scope of this statute of 1868 enlarging our law of attachments. If we were to hold that a suspension of payment not followed by a surrender, the debtor continuing his business and selling his goods with all the qualifications suggested in plaintiff's argument, authorized an attachment, in our view it would be at variance with the jurisprudence that attachments are *stricti juris*, and when questioned must be brought clearly within the statute. Suspension of payment with all the circumstances stated is not equivalent to the debtor converting his property with fraudulent intent, and to so hold would be in our view to give an unwarranted construction to a statute specific and limited in its terms. We have given the plaintiff's case consideration in all its aspects, due to its importance and the ability with which it has been presented, but are constrained to hold there was no basis for the attachment. 24 An. 82, 484; 26 An. 258, 641; 30 An. 394; 32 An. 340.

On the part of defendant we are asked to give a rehearing and increase the damages. On this branch of the case we are confronted with our fixed jurisprudence restricting damages in cases of the dissolution of attachments. There is a disposition of debtors in such cases to overestimate their injury. This case we think furnishes an example. The attachment was for a debt of twelve hundred dollars against debtors possessed, according to their statement, of large means, but temporarily embarrassed. There was no attempt to bond. Mercantile credit is apt to be affected by a circular announcing inability of the merchant to pay his debts. We find it difficult to appreciate that the debtor, being already in a condition of declared inability to meet his engagements, could be injured appreciably by an attachment for a comparatively small amount. It is claimed here that the issue of this writ and seizure under it caused damages to the amount of thirty-seven thousand dollars, made up mainly of supposed injury to credit, and worry and annoyance caused the debtor. We are not impressed with this theory of damage. The law has wisely in this class of cases excluded from recovery as damages injury to feeling and supposed wrongs to credit, unless malice is proved. The law will not mulct

Bloch vs. Creditors.

in damages one who sues without cause, but at the same time without malice. It applies the same rule in cases of dissolution of attachments, and, unless malice is proved, refuses all except actual damages, usually understood to be attorney's fee for dissolving the attachment and injury to the property attached. In this case we can find no basis to attribute to the creditor a malicious motive in suing out his attachment. He could gain nothing by an abortive attachment. He acted under the advice of experienced counsel, who relied on that construction of our attachment laws he has endeavored to sustain before us. There was, we think, no malice. Our judgment allows two hundred and fifty dollars for dissolving an attachment for twelve hundred dollars, and all that we think can be claimed as actual damages. See 18 An. 440; 20 An. 66; 28 An. 592.

We are constrained to adhere to our judgment in this case.

ON APPLICATION FOR REHEARING.

BREAUX, J. The attachment was dissolved at plaintiff's costs; all the costs in the attachment are due by plaintiff.

In matter of the reconvention, the costs are taxed on the defendant Bloch.

The defendant pleaded his claim for damages in the suit at bar, to be decided in one judgment.

"They are due to him in favor of whom the judgment has been rendered." C. P. 157.

Had the defendant obtained a judgment for a larger amount than plaintiff, the latter would have had to pay costs.

The plaintiff having obtained a judgment for a larger amount, costs follow the judgment.

It is admitted by plaintiff and defendant, and it is of record, that the sum of four hundred and twenty-six dollars and thirty cents was paid by the defendant to the plaintiff on the 8th day of September, 1891, and to that amount the judgment rendered is entitled to credit as of that date paid, and this is made part of our original decree, and credit is duly given.

Rehearing refused.

State vs. Cady.

No. 1477.

STATE OF LOUISIANA VS. WM. CADY.

DISCRETION OF TRIAL JUDGES.

Ordinarily an accused can not demand as a right to examine witnesses to rebut the testimony given in rebuttal by the State. The discretion in excluding the testimony was properly exercised.

A witness was contradicted regarding the hour of the night the crime was committed, in the matter of an *alibi* averred. Another witness was called to corroborate this witness, in respect to the hour.

PROOF IN CORROBORATION NOT ADMISSIBLE.

Proof of former consistent statements is inadmissible to sustain a witness who has been impeached by proof of former inconsistent statements, except his testimony is charged to have been given under the influence of some improper or interested motive, or to be a recent fabrication, *i. e.*, where the counsel on the other side impute to the witness a design to misrepresent from some motive of interest or relationship, in which case, in order to repel such imputation, it is proper to show that the witness made a similar statement at a time when the supposed motive did not exist, and the effect of such statement could not be foreseen. Rapalje Crim. Procedure.

The question involved did not fall within the exception, and there was no ground upon which to admit the testimony.

ALLEGED MISCONDUCT.

The harmless utterances of a thoughtless deputy sheriff, in charge of a jury, are not sufficient cause to annul the verdict.

A PPEAL from the Eleventh Judicial District Court, Parish of Acadia. *Perrault, J.*

E. B. Dubuisson, District Attorney, for the State:

Where a witness has been impeached by showing that he made statements out of court contradictory or inconsistent with those made by him under oath at the trial, the party calling him can not sustain him by showing that he made statements in harmony with his sworn testimony. *Conrad vs. Griffey*, 11 Howard, 480; 1 Greenleaf on Evidence, Sec. 469; 1 Wharton, Law of Evidence, Sec. 570 and note 3; *Rapalje Cr. Pr.*, Sec. 316; *Stephen's Digest Law of Evidence*, p. 180; *Pothier on Obligations*, pp. 246, 347.

Especially is this the case where the consistent is subsequent to the contradictory statement. 11 Howard, 480.

HARVARD LAW LIBRARY

State vs. Cady.

An exception is where a witness has been shown to have had a motive to testify falsely; he may be shown to have made statements consistent with his testimony when the motive did not exist, but this case does not fall within the exception.

A party is not entitled to a new trial because of communications made to the jury by the officer having them in charge unless injury is shown to have resulted, or the communication is of such a nature that injury may fairly be presumed. *State vs. Bradley*, 6 An. 580; *State vs. Kennedy*, 8 R. 590; *State vs. Summers*, 4 An. 26; *State vs. Caulfield*, 23 An. 148; *Thompson and Merriam on Juries*, Sec. 362; *Am. and Eng. Ency. of Law*, Vol. 16, p. 530, note 7.

E. P. Veazie and Chas. W. DuRoy Attorneys for Defendant and Appellant:

Where evidence has been offered tending to show bias, improper motive or recent fabrication on the part of a witness, calculated to account for the testimony given, prior similar statements made before such bias or motive could have actuated the witness may be given on redirect examination, or in rebuttal. *Best's Principles of Evidence*, p. 633.

Communications made to a jury, while deliberating, by the officer in charge, will vitiate the verdict when they are of such a nature as to create a suspicion that the verdict was thereby improperly influenced.

Such an irregularity is sufficient to vitiate a verdict, unless it appears beyond all reasonable doubt that no injury could have resulted from it to the defendant. *Thompson and Merriam on Juries*, p. 432.

The opinion of the court was delivered by

BREAUX, J. The defendants were placed upon their trial for burglary and larceny. One was acquitted; the other, Cady, was convicted and sentenced to the penitentiary during five years.

The case comes before us on appeal on bills of exception and a motion for a new trial.

From the first bill we gather that the prosecutor and the other witnesses for the State, by their testimony, fixed the hour of the burglary charged as having taken place between 9 and 10 o'clock.

State vs. Cady.

The defendant sets up an *alibi* as his defence.

The witness for the defendant (his uncle), to prove the *alibi*, testified in chief that his dwelling is eight miles from the house where the burglary charged was committed, and he stated that on the night it is alleged the crime was committed the accused came to witness' house at 10 o'clock.

The defendant having announced that his case was closed, the District Attorney, in rebuttal, called two sons of the prosecuting witness, who testified that shortly after the commission of the alleged crime the witness just mentioned had stated in their presence and hearing that the defendant came to his house on the night of the alleged burglary and larceny at the hour of 11 o'clock.

The State closed its case in rebuttal. The defendant in sur-rebuttal of the testimony of the two sons of the prosecuting witness as to statements made by the uncle of the accused, as a witness, to show that this uncle was not biased, his testimony not a fabrication and that his motives were not improper, called two witnesses who had not previously testified, to prove that at or about the time stated by the two sons of the prosecuting witness, when no reason suggested bias or improper motive, the witness for the State made statements to them consistent with his examination in chief on the trial regarding the hour the defendant came to his home on the night of the alleged crime.

This evidence was excluded from the jury's consideration by the trial judge on the ground that the testimony was not timely offered; that the evidence in chief for the defence had been closed, as was that of the State in rebuttal; that the defendant could not claim as a right the introduction of evidence in sur-rebuttal, it being a matter entirely within the court's discretion.

Second—If the defendant had the right it could only be introduced as testimony in chief after an attempt on the part of the State to impeach the testimony of defendant's witness by cross-examination, and not in sur-rebuttal.

Third—That the purpose was not to prove the incorrectness of the statement of the Dupont brothers, two sons of the prosecuting witness, but to show statements by Dubose, defendant's witness, to the offered witness, whose testimony was excluded, at a time subsequent to the declarations made by him (Dubose) to the Duponts.

The trial judge adds that the testimony of the brothers Dupont

was admitted to prove that Dubose made, some time prior to testifying, a statement at variance from that made by him as a witness; that the defendant, not the State, chose to prove that this witness is the uncle of the defendant; and that the District Attorney did not, on the ground of relationship of the witness, impute to him a desire to falsify the facts.

We are, in this case, confronted with the disagreements that frequently arise between court and counsel as to facts.

Doubtless counsel are entirely honorable in their statement and sincerely believe that the facts are as they represent. This is unquestioned. It is only a question of error *vel non* in this case.

The duty and responsibility resting upon the District Judge, his opportunity for noting the facts, warrant the conclusion that he has not erred. The difference has an important bearing.

With reference to the timely offer of testimony, the first ground relied upon by the trial judge in excluding the testimony in *State vs. Gonsoulin*, 38 An. 461, this court decided that the defendant could not, as a right, examine witnesses to rebut the testimony given in rebuttal by the State, save in cases of rare occurrence; that it was a privilege the court could legitimately refuse to grant.

The case at bar is not exceptional and such as would justify us in taking it out of the ordinary rule in the trial of criminal cases.

Leaving this point, satisfied that the discretion of the court *a qua* was not improperly exercised, we nevertheless take up the next ground, equally as conclusive. The principle is laid down in the books that where "evidence has been offered to show bias, improper motive, or recent fabrication on the part of the witness, calculated to account for the testimony given prior to similar statements made before such bias or motive could have actuated the witness, may be given on redirect examination or in rebuttal. Best, Principles of Evidence, p. 633.

We have the positive statement of the District Court that no such evidence was offered.

The contradiction itself of the witness regarding the hour of defendant's return to his home was shown—nothing more. Not the least attempt was made by the District Attorney to show "bias, improper motive or recent fabrication on the part of the witness."

The defendant chose to prove that the witness is the uncle; a fact not commented upon or referred to on the trial.

The general credibility of the witness was not at issue, nor can

State vs. Cady.

doubt upon his veracity be considered as having been cast by defendant's proof of the relationship existing between them. On proof of that fact, that is the relation existing, this court will not assume that it had a tendency to impute a motive to testify to an untruth.

This case is not within the grasp of the rule.

The defendant assumes that recent fabrication to prove an *alibi* was imputed and that his witness was discredited upon that imputation; having thus assumed he argues by reference to the authorities sustaining the principle that where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that evidence should be rebutted.

Mr. Wharton says that when a witness is assailed on the ground that he narrated the facts differently on former occasions, it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those made on the trial. Law of Evidence, p. 570.

In this case not only the testimony of the witness was not assailed, but the defendant did not offer to impeach or contradict the testimony of the witnesses who testified that the statements (of his defendant's witness Dubose) had not always been consistent with those made by him on the trial.

The second bill of exceptions is abandoned by the defendant. It is not referred to in the brief and presents no ground to set aside the verdict.

The last bill of exceptions taken sets forth the grounds urged for a new trial; that the deputy sheriff in charge of the jury said to them: "You fellows had better go to work, for if you don't decide this case soon the judge may lock you all up till next Saturday."

It was not, as we understand from the bill of exceptions, a threat or an advice, or even a suggestion; it was only the purposeless utterance of a thoughtless officer. This utterance will not influence a body of reasonable men. It was meaningless and could have no influence upon their deliberations. It is manifest that these words, spoken under the circumstances narrated in the bill of exceptions, were not of such a nature that injury may be fairly presumed. It is only upon that presumption that a verdict could be annulled.

The State vs. Summers, 4 An. 26; Thompson and Merriam, Sec. 362.

The defendant's defence does not authorize us to grant him a new trial.

Judgment affirmed.

Andrus vs. Creditors.

No. 1426.

CLINTON B. ANDRUS VS. HIS CREDITORS.

1. CROPS.—As soon as the crop is cut and the fruits are gathered they are movable, and are not part of the property sold, not having been included in the terms of sale of the property of the insolvent.
2. ACCOUNTING FOR CERTAIN MOVABLES POSTPONED.—Property not sold, not charged to the syndic, for he may account for it in another account.
3. COMPENSATION OF GUARDIANS.—Fees of the custodians considered and amount fixed for labor and services, making unimportant amendments regarding these fees and costs.
4. FEE OF ATTORNEY DUE BY ABSENT CREDITORS.—The attorney for absent creditors has no claim for fees against the mass of creditors; it must be paid on the amount of the sums recovered for the account of the absent creditors.
5. MORTGAGE.—In insolvency proceedings the mortgage creditor, for the benefit of other creditors, is not bound to look to other property also affected by his mortgage in the hands of third possessors. Every part of the property mortgaged is liable for the payment of the debt.
6. APPEAL IN CONTESTATION BETWEEN OPPOSING CREDITORS.—The judgment rendered in a contestation between opposing creditors can not be disturbed on appeal, unless the party having an interest to maintain it, is made a party to the appeal.

APPLICATION FOR A REHEARING.

In insolvent proceedings in the *concurso* each creditor who thinks himself aggrieved must appeal in order to have the judgment amended.

A PPEAL from the Eleventh Judicial District Court, Parish of St. Landry. *Cullom, J., ad hoc.*

Kenneth Baillio Attorney for Syndic, Appellant.

Chas. F. Garland for Richard Keough, Opponent.

Lucius G. Dupre Attorney for E. M. Boagni, Opponent.

 The opinion of the court was delivered by

BREAUX, J. The syndic filed a provisional account, to which a number of oppositions were filed.

These oppositions were tried in the District Court, and judgment rendered, homologating the account after passing upon the different oppositions.

46	1351
47	133
46	1351
51	128

46	1351
108	204

Andrus vs. Creditors.

The syndic, personally and as syndic, appeals. He furnished an appeal bond personally, and a bond of appeal as syndic.

His account was amended in the District Court by charging him with—

1. Fifty-two sacks of rice raised in 1892	\$74 40
And adding that sum to the crops accounted for in the tableau.	
2. Two hundred and eighty-seven bushels of corn gathered in 1892.	85 10
3. Stock Chopper	25 00
4. Grist Mill	75 00
5. Hay Rake	10 00
6. Horse-cart and harness	40 00
7. Two old wagons	6 00
8. One pair of cotton scales	5 00
9. Wagon body	4 00
10. Old bagging	20 00
11. Corn-cob and cotton-seed crusher	35 00

He opposes these items amending his tableau, except the first, and appeals to have the judgment corrected in this respect.

He also opposes the amendment increasing the custodian fee of F. K. Bailey to one hundred and twenty dollars, and the judgment allowing Gumbel & Co. and other opponents an additional amount of one hundred and twenty-five dollars, costs incurred by them in the session proceedings of the insolvent Andrus; as also the sum of one hundred and twenty-eight dollars and twenty cents paid by them in the attachment suits against L. V. Major; he also objects to the amendment allowing a fee of eighty dollars to the attorney for absent creditors.

The foregoing are the claims the syndic contends should not be allowed, and he asks that the judgment appealed from be reversed in so far as it amends his account.

None of the creditors have appealed save V. & E. M. Boagni; as appellees they pray for an amendment of the judgment in their respective answers to the appeal.

In addition E. M. Boagni, as mortgage creditor of Andrus, insolvent, having, he alleges, a special mortgage for one sum of fifteen hundred dollars on a place known as "Home" and another special mortgage for six thousand three hundred dollars on all his real estate, opposes the rank given by Vincent Boagni to his own claims on his account as syndic. He moved for and perfected an appeal and is before this court as an appellant.

This opponent alleges that the syndic Boagni, personally, held a general mortgage bearing on all the immovable property of the insolvent.

He admits that his judgment was recorded prior to his (the oppo-

Andrus vs. Creditors.

ment's) special mortgage, and says that it would outrank his special mortgage were it not that Dr. Vincent Boagni released his general mortgage upon a tract of land which the insolvent had sold to John Moreshinscz prior to his surrender.

The opponent claims from Vincent Boagni the value of the mortgage upon which he released his general mortgage, on the ground that he has the right of requiring a discussion of other property embraced by the general mortgage, and *a fortiori* to the value of the property mortgage, but sold since, and the mortgage renounced by the debtor.

The property has been sold and the proceeds are applied on the account of the syndic to the payment of the general mortgage.

The tableau filed shows a balance due the special mortgage creditor of one thousand seven hundred and seventy-six dollars and ninety-three cents, for which he is classed as an ordinary creditor.

Richard Keough is also an opponent and applies for an increase of the amount allowed him as custodian of the property of the insolvent.

S. Gumbel & Co., whose claim is carried on the tableau for the sum of one thousand six hundred and forty-nine dollars and eighty cents, aver in their answer to the appeal that the judgment of the lower court is erroneous because it does not allow their privilege claim on any portion of the crop of 1890 save the cotton crop, though there was a corn crop made that year that realized one hundred and fifty-nine dollars and seventy-three cents, and cotton seed that brought seventy-five dollars.

A number of creditors and opponents, viz.: S. Gumbel & Co., L. Oppenheim & Co., Zuberbier & Behan, Morris McGraw, Scharff & Bro.; Trager, Conner & Co.; Isaac Friburg & Co.; The Ledoux Co., Limited; and Wackerbarth, Joseph & Co., in an answer to the appeal, aver that the judgment rendered by the lower court is erroneous and should be so amended as to allow no more than one dollar per day as compensation to the guardians of property and classed as payable, if by privilege thereon, out of the proceeds of the property guarded by them.

Reviewing each claim in successive order, as above written, the first item in that part of the judgment appealed from amending the account was unintentionally omitted, and no further objection is made against the judgment appealed from, in so far as relates to that claim, as allowed by the lower court.

Andrus vs. Creditors.

Corn and Pecans.—They had been gathered prior to the sale of the land on which they were cultivated and produced, and did not pass to the adjudicatee of the property. There is conflict in the testimony as to the quantity and value. Our views coincide with those of the District Judge regarding these items.

It is urged that the account being provisional, the accounting for this and other property should be postponed to the final account. The testimony was admitted and the issues tried in the lower court without objection of prematurity. Moreover, in the settlement of successions the interests of all parties are served by adjusting differences whenever possible. This item was properly charged.

Stock Chopper.—This implement was on the Home Place when it was sold. It was broken, for which the syndic is not bound on the proof. It was delivered to the purchaser, and if the syndic is responsible it can be accounted for on another account.

Grist Mill.—This property had been removed from the place, and because of the removal was not adjudicated with the land. It was properly charged in the judgment.

Hay Rake—This implement and one of its shafts was broken prior to the surrender; it had small value and is not chargeable at this time.

Horse Cart—It was on the place on the day of sale and delivered to the purchaser. It should be sold and the proceeds charged on account; also whatever remains of the other numbered items and any loss or damage occasioned, for which the syndic may be responsible.

F. K. Bailey's Custodian—The syndic being personally interested as a creditor of the insolvent for a debt preceding the surrender, and an appellant, personally, has the right in his own interest to prosecute an appeal to reduce the amount allowed for services as custodian, and any other claims allowed by amendment to his account he is interested in having reduced.

An examination of the testimony satisfies us that one dollar and a half a day is reasonable compensation for the services rendered. He had charge of three places, cattle and other property, and in addition did work for the estate, requiring his entire time and attention.

Gumbel & Co. et al.—The syndic contends that there was error to the prejudice of the insolvent estate in allowing this firm and others the sum of one hundred and twenty-five dollars costs incurred in the suit

Andrus vs. Creditors.

of Andrus vs. His Creditors; further, in allowing them one hundred and twenty-nine dollars and eighty cents paid by them in the attachment suits of Morris McGraw vs. Andrus; Zuberbie & Behan vs. Andrus; Oppenheimer & Co. vs. Andrus, and others.

In the account the clerk of court is credited with costs in suit No. 14,741, Andrus vs. His Creditors, balance, one hundred and twenty-one dollars and seventy cents. The provisional syndic says that this item of costs is included in the one hundred and twenty-five dollars, and that having been credited to the clerk they should not be credited to the opponents.

The costs are due by the insolvent estate to these opponents, as they were paid by them, and they were decreed due in decided suits.

It was proved that costs of appeal paid by the provisional syndic were ordered to be reimbursed to him by these opponents, in a decree of court rendered some time since. They amount to two hundred and thirty-five dollars and fifty-five cents, and are due by these opponents.

The difference between these two amounts is due to the opponents.

Attorney for Absent Creditors.—The amount allowed for the services is eighty dollars. He represented absent creditors having claims not secured by mortgage or privilege, and rendered services that can not be assessed at less.

Our attention is directed to Sec. 1817, R. S.: "The fees of a counsellor who shall be appointed to represent absent creditors shall in no case be paid by the mass of creditors, but shall be levied upon the amount which shall be recorded for the account of the absent creditors at the rate of five per cent.; provided that in no case shall the fees exceed the sum of two hundred and fifty dollars."

The law being invoked, no alternative but its enforcement is left us.

It has already received judicial interpretation. In Dunbar vs. Creditors, 39 An. 591, this court said: "That section distinctly provides that such fees as those of the counsellor for absent creditors shall in no case be paid by the mass of creditors."

In Pandelly vs. His Creditors, 1 An. 23, this court said: "The next item opposed was that of two hundred and fifty dollars, an allowance to the attorney appointed to represent the absent creditors, which the syndics had paid to him before filing the tableau. It was opposed on the ground that the fees of an attorney appointed in be-

Andrus vs. Creditors.

half of absent creditors should, in no case, be paid by the mass of creditors, but should be levied on the amount of the sums recovered for the account of the absent creditors. Such is the very language of the statute, and this provision of law has been already enforced by the former Supreme Court in the case of *Bijotat vs. His Creditors*, 1 R. 272. In that case the court also considered and refuted the argument then as now advanced, founded upon Art. 3197 of the Revised Civil Code."

These authorities upon this point lead to one conclusion; the amount can not be charged to the mass of the creditors.

Renunciation of Prior Mortgage.—It is contended and proved that the judgment creditor released his judicial mortgage upon one of the tracts of land mortgaged.

The opponent urges that to the extent of the right secured, though his special mortgage is inferior in rank, he has a preference over the proceeds in satisfaction of his mortgage claim.

The property subject to the judicial mortgage was owned by the insolvent prior to his cession, and part of it was transferred by him to a third person subject to that mortgage.

We do not gather from the voluminous transcript that the holder of this judicial mortgage renounced it. He has not chosen to proceed against the purchaser of the property from his debtor, but applies for payment out of the proceeds of the sale of the property of the insolvent, on which also his mortgage rests.

The question arises: Is the creditor bound to impute to the extinction of his credit the value of the property to the possession of a third person also subject to his mortgage, against which he has not chosen to foreclose his mortgage?

Every part of the property is liable for the payment of the debt.

This liability is not restricted by an opposition to payment on the ground that the creditor must be relegated to the foreclosure of a mortgage on property in the hands of a third person.

The property mortgaged has been sold, and is now in the hands of the syndic for distribution.

It can not be withheld or made subject to the issue raised.

Between these two creditors, Dr. Boagni has the superior mortgage on the property, and has a right to the proceeds of the sale.

Richard Keough is another opponent. His services as guardian being similar to those rendered by Bailey, they are fixed at the same rate per day.

Andrus vs. Creditors.

Gumbel & Co.—This firm, for an amendment as to the amount before mentioned, has not appealed. They seek to have the judgment amended upon an answer.

The decision homologating the account in the lower court is a separate judgment, belonging to the party in whose favor it was rendered, and binding on all the parties who did not appeal. *Beer vs. Creditors*, 12 An. 774.

These appellees are without right to a judgment compelling the syndic to deduct amounts from the judgments of other creditors.

Creditors *en concursa* who have not appealed are not in a position to have judgments amended among those from whose judgments they have not appealed.

The questions heretofore considered and passed upon arose between appellants and appellees.

We are not authorized to make a redistribution of any amount among those who have acquiesced in the judgment by not appealing.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed, save in those respects and particulars indicated in the opinion as not affirming certain items.

It is not affirmed in so far as relates to the stock chopper, hay rake, horse cart; as to these articles the provisional syndic, if responsible, will account in another account.

The custodian fees of F. R. Bailey are reduced to one dollar and a half a day and those of Richard Keough are increased to one and a half dollars a day, thereby reducing the amount heretofore allowed to Bailey by one-third and increasing that allowed to Keough by one-third, the number of days of each remaining the same as fixed in the lower court.

Gumbel & Co. are allowed costs in the sum of two hundred and fifty-one dollars and fifty cents, the provisional syndic in the sum of two hundred and thirty-five dollars and fifty cents.

The fee allowed in the judgment appealed from to the attorney of absent creditors is rejected and dismissed in so far as it is claimed as due by the mass of creditors.

With these amendments the judgment appealed from is affirmed at appellee's costs—that is, the appellees actually before the court, viz.: F. K. Bailey, Keough, *Gumbel & Co. et al.* in matter of costs, and the attorney for absent creditors and E. M. Boagni each in proportion to his interest.

Andrus vs. Creditors.

ON REHEARING.

Two of the creditors, viz.: E. M. Boagni and Richard Keough, apply for a rehearing.

With reference to E. M. Boagni the rehearing is refused.

Respecting Richard Keough there is error that we must correct.

The principle is clearly announced in a number of cases:

In insolvent proceedings, in the distribution on the tableau of the syndic, each creditor who thinks himself aggrieved must appeal in order to have the judgment amended.

In *Ferguson & Hall et al. vs. Their Creditors*, 19 L. 278, the plaintiff did not appeal from a judgment which reduced the amount of his claim on the tableau. The judgment remained without amendment.

In *Kohn vs. Wagner*, 1 R. 276, the creditors acquiesced by not appealing.

In *Pandelly vs. His Creditors*, 1 An. 24, the mortgage creditors not having appealed no amendment was made, on the ground that they alone had the right of appeal.

The creditor alone can appeal when his claim is rejected, in whole or in part, by the court of the first instance; if he does not appeal he is held to have acquiesced, and is without remedy on appeal, save in those cases hereafter mentioned.

The claim of each creditor is merged into the judgment of homologation, and to the extent of his interest the judgment is his individual property. *Girod vs. His Creditors*, 2 An. 548; *Beer & Co. vs. Their Creditors*, 12 An. 774.

When an appeal is taken by any one in interest, and the judgment of the individual creditor is assailed, the creditor whose judgment is assailed has the right to answer the appeal and bring up all issue passed upon by the lower court.

It is a condition precedent to hearing him on appeal.

In fine, unless he has appealed or his claim is assailed by the appellant, he can not be appellee with the right to have his claim increased in an amount larger than the amount allowed by the syndic in his tableau.

Applying this rule, the application of which we can not escape, under well established jurisprudence on that point, Richard Keough is not an appellee.

He has not appealed.

Andrus vs. Creditors.

The appellants have not assailed his judgment.

No demand whatever is made assailing the judgment approving and recognizing his claim; all parties, those who have not and those who have appealed, virtually pray that the judgment of this opponent be affirmed.

Judge Martin, in *Abat vs. Nartigue*, 8 L. 192, for the court said, substantially, that claimants whose demands were severally and separately passed upon by the judgment could not be heard on appeal, unless they were appellants.

In a number of appeals since, it has been decided that judgments could not be amended between co-appellees. These creditors are co-appellees; they accept the judgment save one of their number. He is without right, as a co-appellee, to have a judgment amended affecting their interest. The increase of the claim can not be allowed and paid without a corresponding deduction from the judgments of the appellees who have acquiesced.

In appellant's brief he directs attention to the difference between the claim of another creditor and the amount allowed Keough, and asked for its reduction to the amount of wages allowed the latter. We thought, and still think, that it was just to increase the claim of one to one dollar and fifty cents, as in the judgment, and to reduce the amount of the other to one dollar and fifty cents.

Bailey, the other creditor, is a party to the appeal; Keough is not; we, in consequence, can reduce the claim of one of the parties, but we can not touch the claim of the other, not being an appellant.

The rules of pleading are as binding as any part of the law.

Our desire to adjust these claims must yield to the plain letter of the law.

The error can be corrected without granting a rehearing.

It is therefore ordered, adjudged and decreed, that our previous decree increasing Keough's demand to one dollar and fifty cents per day be, as to that demand, annulled, and that the judgment remain undisturbed fixing the amount due him at one dollar a day.

This amendment being made, applications for a rehearing are refused.

Levy vs. Landry.

No. 1464.

LEOPOLD LEVY VS. LAODICE LANDRY. DAVID TODD AND A. H. THOMPSON, INTERVENORS.

The plaintiff and intervenors claimed a quarter section of land, and through *mesne* conveyances traced his title to the government.

The defendant traced his title to a sale of succession property in 1879.

His deed was destroyed by fire. Under a special act of the Legislature he instituted suit against the heirs of his vendor and reinstated the title he claimed.

The weight of the evidence shows that an error was committed in the judgment of revival, and that the defendant was not the owner of the land claimed by plaintiff and intervenors.

The defendant's plea of prescription of ten years is not sustained by the evidence, nor the claim of plaintiff for rent.

A PPEAL from the Seventeenth Judicial District Court, Parish of Vermilion. *Allen, J.*

David Todd, Attorney for Plaintiff and Appellee.

L. S. Bourges for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The present action is petitory. The plaintiff sues to be decreed the owner of the N. E. $\frac{1}{4}$ of Section 20 in Township 12 S., R. 2 E., in the southwestern district of Louisiana.

There are two intervenors; each claiming a parcel of the lands. Their claims are not seriously opposed by the plaintiff.

They allege that the lands in controversy formerly belonged to the succession of Christopher A. Hatch, and that the title passed from his widow and heirs to their author, the plaintiff in this suit.

The defendant controverts the allegations of plaintiff and intervenors and sets up title in himself.

He pleads the prescription of ten years and possession *animo dominorum* during that number of years.

With reference to the facts of the case, the records disclose that a patent issued as alleged, and that plaintiff and intervenors are transferees of the rights acquired under the patent.

The defendant in support of his grounds of defence sought to prove that he bought the land involved in this suit from the succession of Adrien Dartes in the summer of 1879.

The court house of the parish was destroyed by fire on the 7th day of April, 1885, and his deed was burnt.

The defendant, availing himself of the law authorizing proof of record so destroyed, brought suit against the administrator and the heirs of the succession of Dartes, and in 1890 obtained a judgment against them, reinstating the title he claimed.

From the record of that case we gather that a sale was made of the property, at which sale the defendant became the adjudicatee of certain lands.

The defendant believed that he had bought the land of which he had taken possession about ten years prior to the institution of the suit at bar.

The clerk of the court was present at the sale and testifies that he wrote the *proces verbal* of sale; that the defendant bought a quarter section in Section 20, T. 12 S., R. 2 E., divided into lots of forty acres each.

The publisher of the *Meridional*, a newspaper in the parish of Vermillion, testified that he could not find copies of his paper published in July and August, 1879.

Upon the evidence offered the title was reinstated by a judgment of the court.

Upon the trial of the case at bar that judgment was admitted in evidence.

The defendant invokes the law giving effect of an original document to the judgment of reinstatement.

The disinterested witnesses do not establish with any degree of certainty that the lands bought by the defendant from the succession of Dartes are the same as those claimed by the plaintiff and the intervenors. They were aware of the fact that he bought lands at the succession sale. They were not as certain as to its description and location.

Of the proceedings of the sale, there were two remaining copies of the *Meridional*—one copy of August 2, 1879, and the other of August 9, 1879. They were introduced in evidence on the trial of the case at bar. There was no such evidence in the suit to reinstate the lost record.

The advertisement contained in the two copies in evidence show that the following are the tracts of land sold at the succession sale in question:

Levy vs. Landry.

The N. E. 1-4 of the N. W. 1-4 Sec. 20, T. 12 S., R. 2 E.

The N. W. 1-4 and the S. W. 1-4 of the N. W. 1-4, same section, township and range. The remaining tracts advertised are in an entirely different section.

This newspaper contains proof positive of the lands advertised for sale.

The uncertain memory of witnesses regarding sections and quarter sections of land sold many years ago, do not prove title when entirely at variance with the advertisement leading to the sale. We are confronted with an advertisement informing us that the land is in the N. W. 1-4, and not in the N. E. 1-4 of the section, as contended by the defendant. The correctness of the advertisement is not seriously questioned. The witnesses do not positively assail its verity.

It is not proved that the title to any part of the northeast quarter was in the succession at the time, though the defendant was the son-in-law of Dartes and presumably knew something of the titles of the succession to the lands it owned.

Counsel for the defendant argues that the judgment reinstating the sale is binding and final.

The intervenors and plaintiff were not parties to the proceedings to revive. They are not concluded by a judgment decreeing the defendant owner of land the remaining proceedings prove that he did not buy. It was not manifestly the legislative intent to authorize the reinstatement of destroyed records, so as to bind third persons without regard to title on the part of the one at whose instance the reinstatement is decreed.

There was manifestly an error committed in the year 1890, when the judgment of revival was rendered.

Different lands were included within the terms of the judgment from those the defendant owned. The defendant may have been entirely in good faith; presumably he was in good faith, and believed at the time and since the judgment was rendered that he was the owner of the land.

The fact remains that anterior to that year the defendant had no title whatever.

Good faith and title begin from the date of the judgment reinstating the destroyed record, where, as in this case, it is obvious that there was no title whatever in the defendant preceding the date of the judgment.

Levy vs. Landry.

The statute authorizing the revival and re-establishment of destroyed record could not and did not, as against third persons, give retroactive effect to a judgment so as to invest the party suing to reinstate with a right he did not previously possess.

He was not the owner of the lands prior to judgment, and had only the bare possession.

Had he had possession during ten years just preceding the date of the judgment of reinstatement, he would have had no title upon which to base the ten years' prescription. If the defendant had had a title, the judgment would have perpetuated it and secured a previously existing right.

We can not give the court's sanction to an error and hold third persons bound by a judgment reinstating a record manifestly erroneous.

The plaintiff claims rent during six years—in amount five hundred and fifty dollars. The judgment of the District Court is silent as to rent. Before this court the plaintiff, in his answer to the appeal, prays that the judgment appealed from be amended, by allowing him the rental he claims.

Only one witness testified regarding rent. His testimony, general in character, does not impress us as being sufficient to sustain a claim for an amount more than five hundred dollars.

It was expert testimony in an action in which the parties evidently were far more intent in trying the validity of titles than in establishing the rental value of lands.

We do not feel authorized to amend the judgment on the testimony of record.

The appellant prays that the case be remanded to enable him to prove that plaintiff and intervenors had no title.

The issues between the parties were clearly presented. We would be going beyond all precedents if we were to remand a case upon the mere suggestion that there is other evidence obtainable and admissible that would, if admitted, completely make out the defence.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed at appellants' costs.

Rehearing refused.

Board of Police and Mayor vs. Giron.

No. 1469.

BOARD OF POLICE AND MAYOR OF THE TOWN OF OPELOUSAS VS.
HENRY A. GIRON.

The defendant appeals from a sentence condemning him to pay a penalty of eight dollars to the municipality for having violated an ordinance prohibiting the carrying of concealed weapons.

An act may be an offence under the laws of the State and subject to a penalty for violating municipal authority.

The power vested by legislation in a city corporation to make by-laws for its own government and the regulation of its police includes the power of punishing violations of its ordinances, though the offence be also denounced by State laws.

The violators of the ordinances of a corporation are sentenced to pay a fine without a jury. The offences being of minor importance and petty, they can not claim immunity from the penalty imposed by the ordinance by claiming the right to trial by jury before the District Court.

Carrying concealed weapons is an offence against the ordinances of the municipality, and as such is punishable by sentence of the Mayor's Court.

The corporate authority did not exceed their power by adopting a reasonable minimum penalty within the delegated power. The Legislature fixed the maximum penalty at one hundred dollars. The corporation observed that limit and added not less than five dollars. The minimum adopted by the ordinance does not make it illegal, being within the delegated power.

A PPEAL from the Mayor's Court of Opelousas.

Chas. F. Garland for the Plaintiff:

The same act may constitute an offence against both the State and municipal corporation, and may be punished under both without violation of any constitutional principle. *Cooley Const. Lim.* 199; 30 *An.* 454; *Cooley Const. Lim.*, 6th Ed., p. 229, No. 2; *Bishop on Statutory Crimes*, 2d Ed., p. 23, par. 23; *Bishop Criminal Law*, Vol. 1, p. 1029, par. 1028, No. 3.

Jno. N. Ogden and *Jules Gil* Attorneys for Defendant and Appellant:

Municipal corporations have no power to impose a penalty on that which is made punishable, or a criminal offence, under the law of the State. 7 *An.* 651; 34 *An.* 646.

Section 932 of the Revised Statutes having denounced the offence of carrying a concealed weapon and provided the punishment for violating the same, an ordinance of the town of Opelousas on the same subject matter and differing from said law, both in its letter and in its mode of procedure, is illegal.

Board of Police and Mayor vs. Giron.

Article 7 of the Constitution provides the right of an accused party in all criminal prosecutions to be tried by a jury, and an ordinance of a police jury denouncing the carrying of concealed weapons within the town, and providing a short-hand mode of trial which cuts the accused out of a trial by a jury, is unconstitutional.

The opinion of the court was delivered by

BREAUX, J. The defendant was found guilty by the Mayor's Court of carrying a concealed weapon, and was condemned to pay a fine of eight dollars.

He appeals, and urges as grounds to annul and set aside the sentence that municipal corporations have no power to denounce and punish a crime denounced and punished under the law of the State.

That the case is one to which the trial by jury extends.

That Sec. 932 of the Revised Statutes provides a punishment for the crime charged, from which the ordinance of the town of Opelousas, on the same subject matter, differs in letter and spirit, and is, in consequence, null and void.

MINOR OFFENCES DENOUNCED BY STATUTE MADE THE SUBJECT OF
POLICE REGULATIONS BY MUNICIPAL CORPORATIONS.

The first question presented relating to the extent of municipal authority over crimes is not, with us, of first impression.

The point was considered in the case of *State vs. Fourcade*, 45 An. 717.

It was an issue in the case of *State vs. Clifford*, 45 An. 980, in which we held that in view of the necessity of maintaining peace and good order within the limits of municipalities under a sufficient legislative grant of power, municipal corporations may adopt ordinances to that end.

At our term in Monroe, recently held, the question was presented and the cited cases were reaffirmed. *City of Monroe vs. Hardy*, ante, p. 1232.

MINOR AND PETTY OFFENCES VIOLATING THE CITY CHARTER.

The general principles apply only to violations of municipal laws proper and such as fall within the description of municipal police regulations; these prosecutions are limited to certain minor and petty offences.

Mr. Cooley in his work on Constitutional Limitations, p. 241, says: "Municipal by-laws must also be in harmony with the general laws of the State, and with the provisions of the municipal charter. The charter may allow the corporation to pass local laws, but the State laws and the by-laws may both stand together if not inconsistent. Indeed, an act may be a penal offence under the laws of the State, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other."

The decisions in different jurisdictions are not uniform. But we have no less an authority than Judge Cooley, who says that the clear weight of decisions support the proposition that though the Legislature have passed a law regulating as to certain things in a city, the corporations are not thereby restricted from making further regulations.

From Dillon on Municipal Corporations, p. 367, we quote: "Where the act is in its nature one which constitutes two offences, one against the State and one against the municipal government, the latter may be constitutionally authorized to punish it, 'though it be also an offence under the State law.'"

Both reason and authority are on the side favorable to extending to municipalities a reasonable measure of power to enable them to maintain peace and order within their limits.

VIOLATORS OF ORDINANCES NOT TRIABLE BY JURY.

The summary trial without the verdict of a jury for disorderly conduct is not a violation of any of the constitutional rights of the defendant. Cases of the contempt of court are never triable by jury. Its punishment involves fine and imprisonment. There are other charges of minor importance involving the penalty of a fine or imprisonment not triable by jury. The doctrine in this State has always been considered settled that municipal corporations are not within the constitutional guaranty of jury trial; that violators of the ordinances of the corporation, where the Mayor is authorized to impose a fine, may be sentenced without a jury.

Police powers are exercised in all the States for the repression of breaches of the peace and petty offences and the statutes are not taken as conflicting with provisions of the Constitution securing to the citizen a trial by jury. Dillon, Vol. 1, p. 420, 3d Ed.

VIOLATING ORDINANCES BY CARRYING CONCEALED WEAPONS.

Carrying concealed weapons is a minor offence immediately tending to disturb the peace and security of the public. It is not always active and open and for that reason it is the more dangerous and reprehensible. It is of itself a disturbance and a violation of the peace and the quiet of the community for a person to put in his pocket a weapon to kill his fellow man in a chance quarrel or in a premeditated attack. It is a wrong directly affecting the public and a violation of peace and order. Though not classed as such it is a nuisance that ordinance properly seeks to abate.

By the charter the board of police have full power to make such laws and regulations as they may deem necessary for the good order and government of the town.

This authority covers ordinances adopted to maintain peace and order and none are more important to that end than the suppression of the habit of carrying concealed weapons for aggressive use. It is an offence against public order. Dillon, pp. 387-389 *et seq.*, 3d Ed.

PENALTY.

The defendant urges as prejudicial error that the ordinance under which he was fined is in conflict with the section of the statute denouncing the offence of carrying concealed weapons and providing for its punishment. The penalty under the State law is fine or imprisonment, at the discretion of the court, not to exceed five hundred dollars, and the imprisonment not more than three months.

The minimum is not provided in the statute. In the ordinance of the law, assailed, the minimum is fixed at five dollars.

The derivative authority to impose the fine is not given by the statute. The imposition of the penalty is specially authorized by the charter.

The Legislature is competent to delegate to municipal corporations the power to make by-laws and ordinances. Dillon, p. 323, to the same effect.

The Legislature has delegated the needful power to enforce the ordinances and authorized the imposition of a fine of not less than one hundred dollars.

The State has provided special regulations for the town. The charter penalties govern. "The charter, however, may expressly or by necessary implication exclude the general laws of the State on any

Tarleton vs. Lagarde.

particular subject and allow the corporation to pass local laws at discretion which may differ from the rule in force elsewhere." Cooley on Const. Limit., 6th Ed., p. 239.

A penalty imposed within the limits laid down by the charter can not conflict with the State law upon the subject.

The only question is one of power of the Legislature to delegate the authority. It is not at issue in the case; no pleading or argument is made with the view of assailing that authority. An ordinance adopted within the terms of a charter that is legal and valid can not conflict with a State law.

The municipal authorities have adopted a minimum to be observed in imposing the penalty. The charter grants the power in general terms and has not limited the minimum amount imposable for the offence charged. Being authorized to impose a fine of not less than one hundred dollars, it is neither unreasonable, unjust or oppressive to provide that it shall not be less than five dollars. The grant of power is not violated by the limitation provided in the ordinance. The municipal council have not thereby enlarged or changed the charter. It is not precluded from declaring that within the limits it shall not be less than a certain minimum. It is just and reasonable to adjust the penalty to the circumstances of the particular case.

It is the exercise of a power within the province of local government. In endowing a community with corporate life, it was not the intention to hamper and control its functions within the most restricted bounds and prevent the exercise of some discretion in adopting a reasonable minimum within the limits of the penalty.

We are not authorized to annul and set aside the sentence as illegal and contrary to law.

The judgment appealed from is affirmed.

No. 1461.

MARC B. TARLETON VS. ABEL L. LAGARDE.

46 1368
52 1374

The apothecary is not liable in damages to the physician merely and only because the filling of his prescriptions is, on one or two occasions, declined by the apothecary for reasons not at all impugning the physician's capacity. But the apothecary does incur such liability if, without the slightest cause, he indulges in public expressions tending to create the impression of the physician's incompetency, as for instance his diploma is not worth a straw.

Tarleton vs. Lagarde.

The court again discards the distinction of the common law as to slanderous words actionable *per se* and words slanderous in their character, but requiring proof of damage. Civil Code, Arts. 2315, 2316; 16 La. 389; 12 La. 894; 3 An. 207; 14 La. 298.

A PPEAL from the Nineteenth Judicial District Court, Parish of Iberia. *Voorhies, J.*

Weeks & Weeks Attorneys for Plaintiff:

A slander is an oral publication which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned, or which has a tendency to injure him in his occupation. 42 An. 955; 40 An. 423; 38 An. 467; 25 An. 170; Newell on Defamation, Slander and Libel, p. 84; Cooley on Torts, 193.

"If the charges are false, injurious and made maliciously or *malo animo*, they combine all the elements necessary to support the action." 40 An. 424; 45 An. 863.

"Our courts are not bound by the technical distinctions of the common law as to words actionable *per se* and words not actionable *per se*, and allowing for the latter only actual pecuniary damage specially proved." 45 An. 863; 40 An. 424; 12 An. 894; 16 La. 389.

"Both the damage or injury and the malice may be inferred from the nature and falsity of the words and from the circumstances under which they were uttered without the necessity of special proof." 40 An. 424; 45 An. 874; 42 An. 955; 43 An. 967; 43 An. 973; 38 An. 161; 27 An. 214; 23 An. 280; 19 An. 322; 17 An. 64; 11 An. 206; 3 An. 69; 16 La. 389; also *Stewart vs. Carlin et al.*, 2 La. 75.

A druggist may, if he have valid reason, refuse to fill a prescription. But in so doing he must take reasonable care not to cause needless injury to the reputation of the physician.

Where, to protect the reputations of physicians, a certain custom or course of conduct has been adopted by druggists, whereby any doubt they may have concerning the prescription is kept from the patient until the physician has been seen concerning same, this custom must be followed by them. And when a druggist, seeking to injure the standing of a physician, refuses, without cause, to fill his prescriptions, and in refusing flagrantly violates this custom, maliciously communicates to the customer false im-

Tarleton vs. Lagarde.

pressions concerning the medicine, and then goes out upon the streets and spreads false and injurious reports concerning the prescription and the physician, he is liable to him in heavy damages.

If a lawful act be done in a proper, careful manner and injury result to another, this is *damnum absque injuria*, and no action lies. But if a lawful act be done in an improper, illegal manner, and this course be taken to injure another causelessly, then the party is liable to the injured person for all the damage which his conduct has needlessly and wantonly occasioned him.

A person doing an act which must necessarily occasion injury to another, must do it in the manner least harmful to the rights of that other.

Only the substance of the words need be proven. 2 La. 578; 27 An. 247; 43 An. 967.

Walter J. Burke, Attorney for Defendant and Appellant:

A druggist may lawfully refuse to fill a prescription brought to him from any physician, whatever be his motive, unless there be a contract compelling him to do so, and his refusal does not render him liable in damages. 12 An. 255.

A druggist must exercise discretion and judgment in compounding drugs, and it is his duty, or at least he will be protected, if he does not know the nature of the drugs called for, to refuse to fill it; and to communicate his conclusion to the applicant dealing with him and reposing confidence in him is not slander. Bigelow on Torts, p. 66.

In actions for slander, proof positive must be made of the alleged slanderous comments. To prove their substance is not sufficient; the words themselves must be proven. Am. and Brit. Ency. of Law, Vol. 13, p. 485.

To support an action for slander it is necessary that the language used be *false, injurious* and uttered *malò animo*. 40 An. 424; Moakes' Underhill on Torts, p. 19.

It is only to words which are manifestly slanderous in their nature that the presumption of malice attaches. When it is sought to impute malice to the utterance of words, not unmistakably so, proof of malice must be made. 34 An. 1147; 8 An. 130; 2 R. 365.

Tarleton vs. Lagarde.

Slighting comments of diplomas held by physicians, and of physicians generally, or of a class of them, is no slander of a particular physician, inasmuch as it can not affect the degree of respect, good will and social or business distinction to which *his own acts* and *his own social and business habits entitle him*.

Where of two witnesses of plaintiff, on whom the burden of proof rests, who were present during the conversation of defendant in which he is alleged to have slandered plaintiff, one gives a version of the affair which the other claims not to have heard, but repeats words entirely different, and the defendant denies the statement of the first witness and explains the remarks testified to by the second, the preponderance is with the defendant.

Damages from the act of refusal to fill a physician's prescription, even if allowable, can not be inferred from the act. They must be proven.

Where words spoken are not necessarily and intrinsically slanderous they do not awaken the presumption of damages, but these must be specially proven.

The opinion of the court was delivered by

MILLER, J. The plaintiff, a physician, claims of the defendant, a druggist, damages for his refusal to fill plaintiff's prescriptions and for slander. The defence is that defendant was unable to fill the prescriptions, and a denial of the slander imputed to defendant. From the judgment of fifty dollars against him, defendant appeals, and, answering the appeal, plaintiff asks that the damages awarded be increased.

It appears from the record the defendant did decline to prepare two prescriptions of the plaintiff. In one a patent medicine formed a component. The defendant seems to have been averse to putting up prescriptions of which the patent medicine formed a part. In his own language as a witness, he was unwilling to take the responsibility of such a prescription, as he was not sure of the composition of the patent medicine. There is some testimony that it is not usual to include a patent medicine as a component of prescriptions, and there is testimony it is not infrequent. At least, this difference in the testimony of the physicians who testify, deserves some consideration in connection with defendant's unwillingness to prepare the prescriptions. With reference to the other prescrip-

Tarleton vs. Lagarde.

tion, the plaintiff's brief claims defendant should be made liable because of his refusal to fill it, avowed in his answer. But the answer is, that the prescription was not filled for want of the necessary ingredients and other causes. On this branch of the case the propositions affirmed by the plaintiff's case is, that a druggist is to be made liable in damages because he declines to fill prescriptions. We can not assent to this view. In many cases the druggist may have the best reasons for declining to fill prescriptions. As a chemist he may perceive or have cause to suspect the physician erred in his prescription; or the druggist may not have at hand the ingredients; or he may distrust his ability to prepare the prescription, or other causes may disincline the druggist to undertake filling the prescription presented to him. Recognizing the room for all such causes, we can not hold that the mere refusal of a druggist to fill prescriptions furnishes any occasion to hold him for damages to the physician who gives the prescription. It does not appear from the testimony, that in refusing to fill the prescriptions the defendant used any language derogatory to the plaintiff. True, the father of the child for whom one of the prescriptions was given, states the impression as to plaintiff's professional capacity made on his mind by defendant declining to fill the prescriptions was unfavorable. But it is quite certain no such impressions could be derived from anything the plaintiff said, and an impression arising solely from the defendant's right to decline filling the prescriptions, obviously furnishes no cause for plaintiff's action against defendant.

The slander attributed in the petition to defendant was, in the course of a discussion between him and one of his fellow citizens, begun on the street and continued in a barber shop. It commenced with a request of defendant for information of the gentleman addressed, formerly a representative in the Legislature from defendant's parish, whether the law compelled a druggist to fill prescriptions presented to him. The information given on that subject did not suit defendant, seems to have excited him, and led him to make observations offensive and unjust to plaintiff, at least in their tendency to affect those who were gathered by the animated and angry discussion, or to whom the observations might be repeated. The defendant, exercising his privilege of declining to fill plaintiff's prescriptions, should for that very reason have abstained from any comments calculated to convey impressions damaging to plaintiff's

Fontenot vs. Manuel.

character as a professional man. On the contrary, defendant engages in a public discussion on the subject of plaintiff's prescriptions, in which he derided plaintiff's diploma, i. e., he, defendant, would not give a straw for such a diploma, and he further commented on one of plaintiff's prescriptions as containing ingredients that might kill the child. It is in proof that the plaintiff is a graduate of Tulane University Medical Department and that he is a practising physician. There is no testimony to justify defendant's comments on plaintiff's prescription, and there is, if possible, still less extenuation for defendant's disparaging allusion to plaintiff's diploma. Our jurisprudence rejects the common law distinction in actions of slander, of words actionable *per se* requiring no proof of damage and other words slanderous in tendency, but in respect to which the law exacts proof of damage. Under our law malice, the essence of slander, may be inferred from the words, and damages allowed without express proof. Civil Code, Arts. 2315, 2316; Miller vs. Holstein, 16 La. 389; Feray vs. Foote, 12 An. 894; 3 La. 207; 14 La. 298. The application of defendants remarks was well understood. They were uttered publicly. Their natural tendency to affect plaintiff injuriously as a professional man is obvious, and the mischief apt to be done by such language is increased when it is considered that defendant is a druggist in the community in which plaintiff is a practising physician. We have read with care the elaborate opinion of the judge of the lower court. We think that under the circumstances the judgment should be more than nominal. It is a grave matter to assail without a semblance of cause professional reputation. In our opinion the judgment should be increased to one hundred dollars.

It is therefore ordered, adjudged and decreed that the judgment of the lower court should be avoided and annulled, and it is now adjudged and decreed that plaintiff recover from defendant one hundred dollars, with costs in both courts.

No. 1473.

PHILOMENE FRANCOISE FONTENOT VS. JEAN B. MANUEL.

Where the terms of the asserted donations *inter vivos* leave it doubtful whether the usufruct of the property was conveyed to the donee or reserved to the donor, the court may seek the interpretation in the acts of the parties, i. e., denoting their appreciation of the asserted donations. Civil Code, Art. 1956.

48	1373
105	712
48	1373
110	820
46	1373
121	650

Fontenot vs. Manuel.

The court affirms our jurisprudence, that the reservation in the donation *inter vivos* of the usufruct of the property to the donor annuls the donation. Civil Code, Arts. 1468, 1533; 4 An. 86; 5 An. 533; 12 An. 720.

The court must give effect to testimony even when contrary to the allegations in the petition when received without objection from the party who might have excluded it by his objections, and especially when offered and received in behalf of the party by whom that objection might have been successfully interposed if offered by his adversary. 12 Martin, 242; 11 Martin, 26; 18 La. 328.

A PPEAL from the Eleventh Judicial District Court, Parish of St. Landry. *Perrault, J.*

Kenneth Baillio Attorney for Plaintiff and Appellee:

There are three kinds of donations: 1. Gratuitous; 2. Onerous; 3. Remunerative. C. C. 1523.

The onerous donation is not a real donation, if the value of the object does not manifestly exceed that of the charges imposed on the donee. C. C. 1524.

Donations *inter vivos* are liable to be revoked or dissolved on account of the following causes: * * * The non-performance of the conditions imposed on the donee. C. C. 1559.

Where a party claiming under an onerous donation desires to avail himself of the provisions of C. C. 1526, he must do so by a special plea, or defence, invoking in his favor the provisions of that article.

Thomas H. Lewis Attorney for Defendant and Appellant:

It is a condition precedent to an action of rescission of an onerous or remunerative donation that the donor should offer to restore the donee to the same situation he was in before the contract.

The rules peculiar to donations *inter vivos* do not apply to onerous donations, if the charges or services imposed upon the donee exceed the half of the value of the object donated. The rules governing commutative contracts apply in such cases. C. C. 1526.

Such a donation will, therefore, not be annulled on the ground that the donor does not by the act of donation divest himself at present and irretrievably of the ownership of the property.

Upon the annulment of a donation at the suit of the donor for formal defects, full reimbursement and indemnity must be made

to the donee for the expenses incurred and sacrifices necessarily made in complying with the conditions of the donation. Even where the donation is annulled for non-performance of the conditions by the donee, the donor must reimburse the expenses to the extent to which he has been benefited.

An onerous donation, like any other contract, must be so construed, if possible, as to give effect to all its clauses.

The opinion of the court was delivered by

MILLER, J. The plaintiff, Philomene Francoise Fontenot, sues to annul an alleged donation *inter vivos* of her property to the defendant, Jean B. Manuel. The grounds are, that in so far as the donation purports to convey more than the usufruct during her life of the property, it was executed in error; that as a donation it is null because it does not profess to divest her of the property and no delivery was made, and that its provisions are contrary to law; in the event that the donation is maintained as of the usufruct, then the answer claims it should be annulled for non-performance of the conditions imposed on the donee, and the plaintiff finally claimed judgment against defendant for two years' rent of the property occupied by defendant under the donation.

The defendant first filed the peremptory exception that the donation was the onerous donation; that under the conditions imposed on him defendant had incurred expenses and made improvements on the property, and that plaintiff could not maintain the suit without first tendering the amount of those charges and expenses. The exception was referred to the merits, and the defendant answered, setting up the act as an onerous donation, insisting its conditions had been fulfilled, and reiterating the allegations in his exceptions as to the expenses incurred by him and the improvements on the property made in fulfilment of the conditions imposed by the act; the answer claimed, in the event the donation was set aside, that judgment should be rendered against plaintiff for the amount of defendant's reconventional demand of two thousand three hundred and ninety-two dollars.

The judgment of the lower court was in favor of the plaintiff, annulling the donation, and on the reconventional demand awarded six hundred and ninety-two dollars to the defendant. From that

Fontenot vs. Manuel.

judgment defendant appeals, and answering the appeal plaintiff asks that he be allowed the rents claimed in the petition.

The act in controversy opens with the donation of the property, fully describing it, to the defendant on the conditions "that the donee, the said Jean Bte. Manuel, shall himself and wife reside on the premises, attend to the affairs and wants of the donor generally, provide for her wants according to her means. The donee shall also care for and protect the property of *the donor* as he would care for and protect his own property. In case of the illness of the donor the donee and his wife shall nurse her as they would a mother. *At the death of the donor* the donee shall assume *full possession of the property* before described and donated. Prior to *the death* of donor, from this day the said donee shall *enjoy* the possession of said property in *usufruct*, and *cultivate* the land or cause the same to be cultivated for his own use and benefit."

The petition charges the act was intended to give the usufruct to defendant, and the court ascertains it reserves that usufruct to the donor and hence is void.

The donation *inter vivos* is that which divests the donor at present and irrevocably of the thing in favor of the donee who accepts it. The donor may give the usufruct to another, but can not reserve it for himself. It has been uniformly held, under this provision of the Code, that the reservation of the usufruct to the donor avoids the donation *inter vivos*. Dawson vs. Halbert, 4 An. 36; 5 An. 433; 12 An. 721; Civil Code, Arts. 1468, 1533. The defendant insists the donation gives the usufruct to the defendant, and hence is not in conflict with our Code on that point. The act is at best not consistent in its recitals at the *death of the donor*; it declares the donee shall assume *full possession*, yet in its conclusion it is stated that defendant, *before the death* of the donor, shall have possession in usufruct and cultivate the land for his benefit, thus clearly implying that *until the death of the donor* the usufruct was reserved to her. Again, in the body of the act is the stipulation the donee shall care for and protect the *property of the donor* as the donee would his own. This language referring to the property as that of *the donor*, to be cared for as *her* property, is certainly not consistent with the defendant's pretensions that the usufruct in the life of the donor, as well as the property after her death, was given to him. If that had been intended the donation would have been simply of the property. Allu-

sion to the usufruct would have been useless. So while the act in its closing sentence states that usufruct and possession shall be in the donee from its date, the stipulation is inconsistent with other parts of the act referring to the property as that of the donor to be taken care of by the donee and giving him possession only at the death of the donor.

The conduct of plaintiff and defendant since the donation is instructive, that both interpreted the act that plaintiff was to retain possession and administer the property for her benefit. Civil Code Art. 1956; 2 Hen. Digest, p. 1012, No. 7. Thus it appears that after the donation the plantation, or certainly part of it, was cultivated on shares under contracts made by plaintiff exerting control as owner, as such deriving the revenue from that cultivation. This manifests that both appreciated she retained the usufruct. Again, the record of over five hundred pages, submitted to us, teems with the complaints of plaintiff that *her* property, since the act of donation, was not properly cared for, *her* cattle suffered to die from want of attention, *her* dwelling going to decay and the fencing suffered to rot, all from defendant's neglect. Along with these complaints are the defendant's denials and his testimony that he did look after the cattle, prop the dwelling and mend the fences. The plaintiff's complaints and defendant's justifications, or excuses, all impress the mind as part of the usual intercourse of a dissatisfied owner against the person selected to manage that owner's property. If the defendant had been understood to be clothed by the act in question with the usufruct of this property, beginning from the date of the act, besides the full ownership after the plaintiff's death, there would have been no reason for plaintiff's complaints as to its management. But on the theory that the plaintiff reserved the usufruct of the property, and defendant was to manage for her, her complaints and his statements justifying his management are easily understood. Again, it appears the plaintiff paid the taxes on the property. If it had ever been intended defendant was to have the usufruct under the donation it was for him to pay the taxes. Civil Code, Art. 1551. So then the conduct of both parties, in our view, manifests plaintiff, the donor, was to have the usufruct, and that conduct is a better guide to the intention of the parties than the inconsistent statements of the act.

Again, without objection from either side, the testimony is in the

Fontenot vs. Manuel.

record from the plaintiff that defendant was to have the property after her death if he took care of her, until which, to use her own language, she was to be master. The insistence throughout defendant's testimony is that the act gave him the property, but it is equally true that after the donation, while he resided on the place, plaintiff exerted control as owner, and this is made to appear more distinctly in a part of his testimony when, speaking of the share contracts by plaintiff, he testifies she made the bargains, he got no part of the share contracts, and as a part of his duty he would have made those contracts for her if she had permitted him. When to all this is added the testimony of the notary, produced by the defendant, that his direction from the plaintiff as to the act, was that the defendant was to have the property "in fee simple to take effect after the donor's death," followed by the repetition from the notary that it was explained at the time of passing the act "it was to take effect only after the death of the donor," it seems to us that putting aside any question of the precise issue made by the petition and giving effect to the testimony offered by defendant, and admitted over plaintiff's objection, and looking to the conduct of the parties as aiding the interpretations of a badly worded act, the conclusion is inevitable that the so-called donation did not, as the Code expresses it, divest the donor at present and irrevocably of the property. It sought to do that which the law prohibits.

Under the law it is the donation *mortis causa* that is to dispose of the testator's property after death.

The donation that undertakes to dispose of it before death must strip the donor at once of the property. It operates *in presenti*, and any reservation of the usufruct to the donor annuls the donation. The donation here is within this prohibition. This was the conclusion of the lower court, and we think is abundantly sustained by the record. Civil Code, Arts. 1468, 1469; 4 An. 36, and authorities already cited.

The ground discussed is enough to give plaintiff the case. It may be added that the act prepared to be drawn, as testified by the notary, and as explained, as he states at the time, *i. e.*, a donation *inter vivos* to take effect at the donor's death, necessarily left the usufruct in the donor until her death. Such an act obviously would have violated a prohibitory law. Civil Code, Art. 1533. The defendant's argument is, that the act gave the usufruct at once

Fontenot vs. Manuel.

to defendant. Then it transcended the purpose of the parties, according to the testimony of the notary, defendant's witness. There is inconsistency in the testimony, and arising from their conduct as to the purpose really intended. It is our impression on the whole case that the act is void on another ground; there was no *aggregatio mentium*, or at least the testimony fails to satisfy us that any concurrence of mind of the parties finds expression in the act, repugnant as we think the act is in its terms, and contrasted as we deem it with the testimony and conduct of the parties. On this ground we hold the act void as well as on the other.

The defendant urges that the plaintiff should have tendered the expenses and losses incurred by defendant in order to comply with the conditions of the act. These items claimed by plaintiff amount to two thousand three hundred and ninety-two dollars, made up of loss of crops on his plantation caused by removing to plaintiff's plantation as required by the act; the expenses of that removal, the amount of fencing by defendant, and the cost of levees made and of lumber furnished by him; for two years' services of plaintiff and his family in waiting on plaintiff and attending to her wants, and finally five hundred dollars claimed for the loss of society by defendant's moving from his neighborhood to defendant's plantation. This amount is claimed in the alternative, i. e., if the donation is not sustained and the want of tender of the amount pleaded as a peremptory exception, it is insisted should itself have defeated the action. In our view no tender was requisite to annul an act we hold to be void.

On the reconventional demand, in our view a large part of it is inadmissible. We have carefully considered this branch of the case, and in our opinion the amount allowed by the judgment of the lower court is ample. The defendant does not object to the allowance save as to ninety-two dollars, which we think was allowed in error. On the claim for rents preferred by plaintiff's answer to the appeal, we see no basis to make defendant pay rent for land on which he resided under the stipulation in the act.

We have not discussed all the points argued by counsel because in our view unnecessary, by reason of the view we take of the act under consideration.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be amended so as to restrict defendant's judgment against plaintiff to six hundred dollars, with costs of the appeal to be paid by defendant, and that in other respects it be affirmed.

Fontenot vs. Manuel

ON REHEARING.

The earnestness of the application for the rehearing has induced us more readily to re-examine this case.

The point urged with great force in the application is, that the petition of the plaintiff attacking the donation avers the intention of the donor was to give the usufruct to the donee, and yet the decision holds the donation void, because it does not give the usufruct to the donee. The court had the fullest appreciation of the contrast between the allegations of the petition and the conclusion reached by us, and that discrepancy formed part of the difficulty we encountered in our consideration of the case.

It must be borne in mind that the pleadings indicate the issue of right to be determined by the judgment, or rather the relief to be granted. But the court, in ascertaining the relief to be awarded, is guided by the testimony offered and received without objection. Whatever the allegations in the petition, the court must consider and give effect to the testimony produced. It has become a familiar rule that though a party has mistaken his rights in the petition, yet he will recover judgment according to the testimony received without objection, and that testimony which might have been excluded by an objection will bind the parties if suffered to be introduced. The judicial allegation undoubtedly binds the party in whose behalf it is made, but, if not insisted on, yields to testimony received without objection. Thus, in 11 Martin, 26, the rule under consideration is expressed: If the party mistake his right in the petition the error is cured by evidence establishing it when received without objection. In 12 Martin, 242, the expression is: Although the allegation be that property belonged to the community, yet if it is shown by testimony received without objection to be the property of the wife, effect is given to the testimony. Again, in 18 La. 328, it is laid down: A party who, without opposition, permits the introduction of testimony contrary to the allegations in the petition is bound by its effect.

With this rule in view we find on the issue submitted as to the validity of this asserted donation an act, to say the least, inconsistent in its terms, leaving in doubt, at best, the divestiture by the donor of the property imperatively exacted by the Code. On the question of intention we find a mass of conflicting testimony as to

Fontenot vs. Manuel.

whether the life usufruct was intended to be given the donee or reserved to the donor. And as to the property itself, there is the avowal by the notary who passed the act offered by the defendant, that the donation of the plantation was to take effect after the death of the donor. On the issue of possession we find it put beyond all controversy that after this so-called donation the donor continued in possession, leasing part of the land on shares, hiring a laborer to cultivate another portion, deriving the few revenues for herself without the slightest objection or claim from defendant. We find, too, that consistently with the actual retention by the donor of the property and of its revenues after the supposed donation, she paid the taxes on the property. If it had been intended the donee should have the usufruct, or if he had had it in fact, it was his obligation to pay the taxes. Civil Code, Art. 1551. As to the usufruct asserted on behalf of the defendant if it ever existed, it would be ended by his death and by the death of the donor, and of both these deaths we are informed by the record. The discussion as to the supposed usufruct of the donee during the life of the donor, presents no practical importance. As to the supposed donation of the property, in our view there is no escape from the conclusion under all the testimony it was not to take effect till the donor's death, and was and is utterly void on that ground. This court can not close its eyes to all this testimony of the actual fact, and hold notwithstanding the life usufruct was the donee's, because of the allegations in that respect in plaintiff's petition, overthrown, we think, by testimony offered without objection, or hold that the donation of the plantation divested the donor "at once," as required by the Code, when the act is, we think, and certainly the testimony shows it was, only to take effect after the donor's death.

It must be borne in mind, too, the court is dealing with a prohibitory law in the public interest to maintain the simplicity of our system of titles, exacting that donations *inter vivos* must *in presenti* divest the donor of the property. The inhibition is like the prohibited *fidei commissum* and annuls the act. It might be claimed the court would be bound to enforce such prohibitions even if not pleaded.

Aside from this, in our view within the scope of pleadings and of testimony offered on one side without objection and of that produced by the other we are authorized to hold the act submitted to us void

Koch vs. Godchaux.

as a donation *inter vivos*, because, as was also held by the lower court, there was no divestiture of the donor of the property she professed to give. Civil Code, Arts. 1468, 1533; 4 An. 36; 5 An. 533; 12 An. 726.

We have gone over the testimony on the reconventional demand. We accepted the statement in plaintiff's brief that ninety-two dollars of the demand had been paid. The record is voluminous, and on re-examination we do not find the proof of payment except as to a cabin. As there seems to be a doubt as to the alleged payment we have concluded to let the judgment of the lower court stand. We have considered defendant's argument for an increase of the judgment on his reconventional demand, but, in our opinion, the lower court allowed enough.

It is therefore ordered, adjudged and decreed that the judgment of this court heretofore rendered be amended so as to allow defendant six hundred and ninety-two dollars, and with this modification the judgment of the lower court be affirmed, with costs.

Rehearing refused.

No. 1466.

NATHAN KOCH VS. LEOPOLD GODCHAUX.

An opposition without bond to a seizure and sale presents the issue only whether the notes on which the writ issues have been paid, or obtained by fraud, or other defences specified in Arts. 738, 739 of the Civil Code of Practice, exist; hence, when the notes are for an amount less than required to give this court jurisdiction the appeal will be dismissed, although the opposition claims judgment for a larger amount against one not before the court and against whom no judgment can be given. 15 La. 353; 4 Rob. 490; 29 An. 124; 30 An. 1163; 31 An. 112.

A PPEAL from the Eleventh Judicial District Court, Parish of St Landry. *Perrault, J.*

Kenneth Baillio Attorney for Plaintiff and Appellant:

Notes made payable to a particular person and not bearer, nor to the payee or order, are not negotiable and do not fall under the commercial law. 12 R. 144, 150; 3 An. 220; 4 An. 233, 127; 7 An. 599; 25 An. 49.

When the judge grants an injunction on the allegations under oath of any of the reasons mentioned in the preceding article he shall

Koch vs. Godechaux.

require no surety from the defendant, but he shall pronounce summarily upon the merits of his opposition if the plaintiff requires it, as is explained below. C. P. 740.

A debtor can arrest the sale of his property seized under executory process by alleging under oath any of the following reasons:

* * * * *

That it has been extinguished by transaction, novation or some other legal manner.

That it was obtained by fraud, violence, fear or some other unlawful means.

That he has a liquidated account to plead in compensation to the debt claimed. C. P. 739.

B. Titche and C. F. Garland Attorneys for Defendant and Appellee:

Where an injunction issues, *without bond*, against executory process, upon one or more of the grounds enumerated in Art. 739, C. P., the plaintiff in injunction will be restrained, for the maintenance of his writ, to proof of the grounds thus selected, although he may aver other causes not enumerated in that article. 30 An. 1163, Williamson vs. Richardson; 31 An. 112, Berens vs. Boutte; 32 An. 767, Gillespie vs. Scott.

Unliquidated claims can not be opposed in compensation to promissory notes. R. C. C. 2209; 32 An. 877, Burbridge vs. Anderson; 28 An. 97, Berens vs. Ker; 38 An. 941; 26 An. 740, Noble vs. Flower; 22 An. 430 and 443; 24 An. 208, "a claim for damages can not compensate a note;" 26 An. 716, "an account does not compensate a note."

Before seeking to annul a contract of sale, the party asking relief must offer to place his adversary in the same situation that he occupied before the sale occurred. He can not keep the thing purchased and at the same time refuse payment of the price. 14 An. 716, McDonald vs. Vaughn; 14 An. 56, Van Wick vs. Rist; 31 An. 81, Byrne vs. Bank; 29 An. 245, Blake vs. Nelson; Matta vs. Henderson, 14 An. 473.

The opinion of the court was delivered by

MILLER, J. The plaintiff issued executory process on two promissory notes made by defendant for amounts aggregating, with the ten

Koch vs. Godechaux.

per centum for attorney's fees, stipulated in the mortgage acts, an amount less than two thousand dollars. The defendant obtained an injunction without bond under Arts. 738, 739, Code of Practice, to arrest the execution of the writ of seizure and sale. The opposition substantially averred that the notes were given for the purchase by defendant of the interest in a commercial partnership of Albert M. Silbernagle; that he represented to defendant the partnership was prosperous and agreed that the notes should be deposited with a third person to protect defendant against any claims against Silbernagle that might be brought against the partnership arising from any act of his, of appropriations for his benefit of the partnership funds, or of a character to bind the partnership, the debts of which defendant assumed payment in his act of purchase.

The opposition proceeded to aver that subsequent to defendant's purchase of the partnership interest, the defendant discovered that it was bound for a large debt of Silbernagle, which defendant, under his assumption, had been compelled to pay, and that Silbernagle's representations as to the condition of the partnership had been falsified in other respects; that it was found Silbernagle had made overdrafts on the partnership funds and appropriated such funds to a large amount, against which overdrafts and appropriations the guarantee and pledge of the notes had been given defendant by Silbernagle at the time of defendant's purchase of the partnership interest. The opposition charged that the notes had been obtained by these fraudulent representations of Silbernagle as to the condition of the partnership, and that this debt for which he had bound the partnership and defendant had been compelled to pay, and the overdrafts and misappropriations by Silbernagle of the partnership brought to light after defendant's purchase of the interest, aggregating over eleven thousand dollars, were offsets against the notes sued on by which they were compensated. Koch, the plaintiff, was charged to be the agent of Silbernagle, holding and suing on the notes for his benefit, and the opposition prayed for judgment maintaining the injunction decreeing the notes compensated, and for judgment against Koch as agent of Silbernagle for the excess over the notes of the offsets pleaded in the opposition.

Instead of treating this opposition as an answer, the plaintiff excepted that it showed no cause of action, and that exception sustained, the case is here on the defendant's appeal and encounters

HARVARD LAW LIBRARY

Koch vs. Godchaux.

the plaintiff's motion to dismiss on the ground that the amount involved is less than two thousand dollars.

An opposition and injunction without bond is an incident to the demand in the petition for the seizure and sale. It is in legal effect an answer to the petition. The opposition is restricted to the issue whether the notes on which the order for the seizure and sale is based have been obtained by fraud, or paid, or extinguished, or other defences exist specified in the Code, authorizing the opposition without bond. The opposition if maintained, simply and only arrests the seizure and sale, and decrees that plaintiff can not enforce the notes. Code of Practice, Arts. 738, 739; *Hozey vs. Sheriff*, 15 La. 353; *Monott vs. U. S. Bank*, 4 Rob. 490; *Conrad vs. Sheriff*, 29 An. 124; 30 An. 1163; 31 An. 112. It follows, therefore, that the remedy selected by the defendant, i. e., an opposition without bond to arrest the sale of his property on the ground the demand can not be enforced, restricts the issue to that demand, which, as already stated, is under two thousand dollars.

Indeed, in another point of view there is but one suit before the court, i. e., between plaintiff Koch and defendant Godchaux and on the notes. There is a demand of defendant against Silbernagle for judgment for the excess of defendant's offsets over the amount of the notes. But Silbernagle is not before the court. It is alleged in the opposition that the notes are not owned by plaintiff, but are sued on for the benefit of Silbernagle, and there is the prayer for judgment for the excess of the offsets against plaintiff as agent of Silbernagle. It is manifest no such judgment could be given against one not before the court either by citation, appearance or any mode, save the recital in the petition that suit is for his benefit utterly ineffective, if it were so, to introduce him as a party against whom a money judgment could be rendered. Koch, the plaintiff, is before us simply and only as holder of the notes, and the only judgment the record admits is whether he can enforce a demand less than the amount to give the court jurisdiction.

We listened with interest to the able argument in support of the defence on the merits, but we reach the conclusion that there is no jurisdiction in this court to deal with the merits.

It is therefore ordered, adjudged and decreed that the appeal in this case be dismissed at appellant's costs.

Chachere et als. vs. Block.

No. 1470.

JAMES O. CHACHERE ET ALS. VS. SIMON BLOCK; JAMES O. CHACHERE
VS SAME.

The court again recognizes that in the petitory action the plaintiff must recover on the strength of his title, not on the supposed weakness of that of the defendant. 9 Martin, 267; 5 La. 78; 2 An. 246.

The surrender in bankruptcy under the act of Congress of 1867 carries all the property of the bankrupt to the assignee, and no action upon the property or any specific part of it can thereafter be maintained by the bankrupt or by any one claiming by purchase from them, unless by a new title acquired since the bankruptcy. Bankrupt Act, Sec. 14; Bump. on Bankruptcy, 10th Ed. 247; 44 An. 444.

Hence, when the petitory action by the bankrupts or their transferees is avowedly for property thus surrendered in bankruptcy, and asserting title existing at and before the bankruptcy and which necessarily passed to the assignees, the action can not be maintained. *Ibid.*

No court can enforce the demand of the bankrupt for property belonging to him at the date of his bankruptcy, which, by the law and his oath to a full surrender, passed to his assignees, unless the property is claimed by a new title from the assignee. 2 Hennen's Digest, *verbo* Illegality of Contract; p. 1007; 31 An. 577.

A PPEAL from the Twelfth Judicial District Court, Parish of Calcasieu. *Fournet, J.*

E. L. Wells Attorney for Plaintiff and Appellant.

A. P. Pujot Attorney for Defendant and Appellee.

The opinion of the court was delivered by

MILLER, J. The plaintiff, James O. Chachere, as the transferee of Joseph Block, and the heirs of Achille Dupré, bring this suit against Simon Block to be recognized as owner in common with him of certain lands in the parish of Calcasieu. The defendant asserts title to the whole of the land under tax titles acquired by his vendor in 1881. It is conceded that Simon Block, Joseph Block and Achille Dupré were once owners in indivision of the lands. The plaintiffs claim that the relations of joint ownership existed at the date of the tax sales in 1881; that the sales were in the interest of Simon Block; that hence he could not acquire from the purchaser at the tax sale the whole of the property to the prejudice of his co-proprietors, and at best the tax titles can avail only as effecting a redemption of the

land from the taxes; but the petition further avers that the tax sales are void because there was no proper assessment or notice to the owner, or other formalities observed required in tax sales.

The defendant, Simon Block, asserts the validity of the tax titles, and besides pleads that the title of Joseph Block, from whom Chachere claims to acquire, and of Achille Dupre, under whom the plaintiff, his heirs claim, was divested by the surrender in bankruptcy under the Federal Bankrupt Act of 1867, made by Joseph Block and Achille Dupre in 1874, at which date their titles, now asserted by plaintiffs, existed, and consequently passed to the assignees of the bankrupts. This surrender, supported by the usual decrees of adjudication in bankruptcy and the appointment of the assignees, the defendant pleads as an estoppel against Chachere as assignee of Joseph Block and the heirs of Achille Dupre. Other defences were urged in our view unnecessary to be noticed. From the judgment of the lower court sustaining the estoppel, the plaintiffs appeal.

By a different line of argument we reach the conclusion that plaintiffs can not maintain this action. It is beyond controversy the titles of Joseph Block and the heirs of Achille Dupre existed at the date of the bankruptcy proceedings. It is claimed by the plaintiffs the property covered by these titles was not placed on the schedules of the bankrupts. But under the law the surrender divests the title of the bankrupts whether or not the property is placed on the schedule. Again, it is urged on behalf of plaintiffs that the bankrupts can assert title on the presumption their debts are all discharged, and because the assignees make no claim. But it is well settled under the bankrupt law that the title of the bankrupt is forever divested by the surrender, that he can never claim any specific property included in the surrender unless by a new title. See *Bump. on Bankruptcy*, Sec. 14; *May vs. Railroad*, 44 An. 453.

The plaintiff in the petitory action must recover on the strength of his title, not on the weakness of that of his adversary. The plaintiff's case, or at least the testimony produced, i. e., the proceedings in bankruptcy, develop that the property they undertake to claim passed to their assignees in bankruptcy years since. The defendant claims he holds by a new title acquired since the bankruptcy proceedings from the purchaser at the tax sale. But the character of his title, good or bad, or whether or not supported by the prescription

Deroen vs. Hebert et als.

he pleads, is not at all important. It is enough that plaintiffs have no title. 9 Martin, 267; 5 La. 78; 2 An. 246.

There is another view of this controversy. Simon Block was a party himself to the bankruptcy proceedings, as a member of the commercial firm of which Joseph Block and Achille Dupre were also members, all adjudicated bankrupts. None of these parties can appeal to a court of justice to settle disputes arising out of their claims to property which passed to their creditors, and in respect to which, consistently with the law and their oaths to the surrender of all they possessed, they can advance no right whatever, unless by a new title. No such new title is asserted by plaintiffs, and whether the defendant exhibits such new title is a question on which we express no opinion. See cases collected in 2 Hennen's Digest, 1007, *verbo* Legality of Contracts, No. 1 *et seq.*

It is therefore ordered, adjudged and decreed that the judgments of the lower court be affirmed, with costs.

Rehearing refused.

No. 1462.

HAMILTON DEROUEN VS. F. JULES HEBERT ET ALS.

Where mortgaged property is seized in the hands of a third possessor, who consents to its seizure and sale, waives the thirty days' demand of payment on principal debtors, and the ten days' demand on him as third possessor thereof, and who also accepts service of notice of seizure, appoints an appraiser to estimate the value of the seized property, and is present at the sale offering no objection but bidding thereon, he is estopped from attacking subsequently the validity of the sale for any defects or informalities in the proceedings arising anterior to the sale. 5 R. 523; 19 L. 311; 12 An. 838; 2 An. 593; 1 An. 11; 36 An. 774; 43 An. 323; 34 An. 886.

Where the third possessor of property seized and sold to satisfy a previous mortgage is not an heir of the defendant in execution or interested in the distribution of the proceeds of the sale, he has no right to question whether the vendee paid the price, or whether the terms of the sale were complied with by him. 36 An. 774; C. P. 15.

A PPEAL from the Nineteenth Judicial District Court, Parish of Iberia. *Voorhies, J.*

Sigur & Sanders and Todd & Todd Attorneys for Plaintiff and Appellant.

Walter J. Burke and Foster & Broussard Attorneys for Defendants and Appellees.

The opinion of the court was delivered by

PERRAULT, DISTRICT JUDGE. Plaintiff alleges that he is the owner of a tract of land known as the "Hayes place," situated in the parish of Iberia, described as Sections 47, 49, 50 and 51, in T. 13 S., R. 5 E., in the Southwestern Land District of Louisiana, containing one thousand nine hundred and twenty-four and 12-100 acres. He further avers that a sale thereof was made to the principal defendant, F. Jules Hebert, by C. T. Cade, Sheriff of Iberia parish, December 24, 1892, under a *fi. fa.* issued out of suit No. 349 of the docket of the Nineteenth Judicial District Court of Iberia parish, entitled "David Hayes, Administrator, vs. Wm. Hayes *et als.*," for the ostensible price of twenty thousand dollars cash. That shortly after said adjudication Hebert sold parts of said land to Zénon Decuir, Marcel Derouen and Ludger David, and that by other transfers Hebert and these latter persons sold other parts of said property, which they had ostensibly purchased to various other persons, viz.: Chris. Kopp, Wm. Hollander, Joseph Glenbrech. Max Voge, Aristide Norres, Ducré Norres, Delette Destrouet, Ambroise Destrouet, Frank Morgan, Bazille Latiolais, Aristide Delcambre, Leo Dionne, Besta Lipsky, wife of Max Voge, as shown by several deeds, all of whom are alleged to be in possession. The petition charges that the sale made to Hebert by Cade, Sheriff, was null and void, because the writ did not give the names of the defendants nor third possessors, and was not directed against said third possessors; that the notices to defendants and the third possessors were never issued nor served, nor proper delays given preceding the seizure and sale under said judgment; that there was no legal advertisement of said property and that the advertisement did not mention that the proper notices had been given to the third possessors of said property and that it was to be sold under a vendor's lien and privilege, and further, that no legal certificate of mortgage was read at said sale by which purchasers might know under what judgment said lands were sold.

The petition further charges that Hebert's bid on said property was fictitious, that he never complied with the same by paying the ostensible purchase price of \$20,000 cash to the sheriff or to the plaintiff in the writ, and that if any check or draft was given therefor by said Hebert it was merely for a sham, and did not result in payment, but was the result of a collusion between said Hebert and

Derouen vs. Hebert et als.

Teburce Norres, administrator of the estate of John Hayes, by which the former was illegally and unfairly vested with title to said land, therefore the sham bid and sham payment carried with them no legal result, and could not form the basis of a legal title to Hebert. Further charging that Hebert's title derived at said sheriff's sale, for said reasons, is an absolute nullity, he avers that the subsequent transfers of parts of said land to the other defendants are likewise null and of no effect as to him, and further charges that said illegalities and wrongs committed were not known to him until the institution of the present suit. He demands that said sheriff's sale be declared null and void; that his ownership to said property be recognized against all the defendants in possession, and that a writ of possession issue, and that he be put in possession thereof.

Zénon Decuir, one of the defendants, excepted to plaintiff's suit and demand on the grounds, viz.:

1. Because there was a misjoinder of parties as to him, inasmuch as plaintiff's petition did not disclose any privity of contract between him and the other defendants.

2. Because the plaintiff did not allege a tender to defendants, which allegation is a condition precedent to the annulment of a sale or commutative contract.

3. Because plaintiff is estopped by his words, actions and deeds, in that he has made both judicial and extra-judicial admissions and declarations, which prevent him from denying defendant's title, and by which he is bound.

4. Because the question of ownership of the property in contest has been passed upon by this court, and is *res adjudicata*.

- 5 and 6. Because the petition discloses no cause or right of action.

F. Jules Hebert, the main defendant herein, answered by general denial, with admission that he had purchased at said sheriff's sale the property in contest for twenty thousand dollars cash, with special averment that all the proceedings leading up to said sale were valid, but that he was in no way connected therewith. He specially averred and set up that plaintiff was the third possessor of the land sold by him (Hebert), and that preceding the sheriff's sale, as such third possessor, he waived notice of seizure due to him as such, as also the thirty days' demand of payment on the debtors and the ten days' demand of payment on him as third possessor of the mortgaged property; that he appeared at the court house on the day appointed

Derouen vs. Hebert et als.

and fixed for the sale of said property, appointed an appraiser to act for him in his behalf in the appraisement of the said property, that he was a bidder at the sale thereof, and that after the sale and adjudication of the said property to him (Hebert), plaintiff, who was in possession of part of said property, vacated it, and delivered up possession thereof to him (Hebert), and because of these acts and conduct of plaintiff he (Hebert) was induced to believe that there was no objection to the sale of said property, that the title thereto was valid, and he was therefore induced to purchase and pay for same; because of all these acts, conduct and declarations of plaintiff he is estopped from denying the legality of his (Hebert's) title thereto. As further defences, this defendant avers that plaintiff's petition discloses no cause of action, and that he has no right of action based upon the averments of said petition.

All the other defendants, including the administrator of the estate of John Hayes, deceased, and C. T. Cade, sheriff, answered, setting up substantially the averments contained in the answer of the defendant, Hebert, and specially invoking the plea of estoppel and the exceptions of no cause of action and of no right of action, and whilst other averments peculiar to them and their rights were made, it is, in our opinion, unnecessary to mention them here.

The lower court maintained the plea of estoppel interposed by the defendant Decuir by way of exception, and, after trial on the merits of the case, judgment was rendered in favor of all the other defendants, maintaining the plea of estoppel and the exceptions of no cause of action and of no right of action, from which judgments plaintiff appeals.

The view which this court takes of the pleas of estoppel, as also of the exception of no right of action pleaded by the several defendants, precludes the necessity of passing upon other defences raised by them or of deciding issues raised by plaintiff not involved in these special defences.

ESTOPPEL.

The record discloses the following uncontradicted facts: Teburce Norres, present administrator of the estate of John Hayes, deceased, caused a *fi. fa.* to issue in suit No. 349 of the civil docket of Iberia parish, entitled "David Hayes, Administrator, vs. Wm. Hayes *et als.*," directing the sheriff of Iberia to seize and sell the property in con-

Derouen vs. Hebert et als.

test herein, which, according to the terms of the judgment, was subject to vendor's lien and special mortgage in favor of the estate of said John Hayes.

Before the writ of *fi. fa.* issued against the judgment debtors, the hypothecary action was resorted to against plaintiff herein and one A. L. Hayes, who were the third possessors of said property, and in answer thereto said plaintiff herein and said Hayes declared that they had no objection to the execution of the judgment in satisfaction of the debt, and moreover signed written waivers of their rights as third possessors of the thirty days' demand of payment on the debtors and the ten days' demand on them as third possessors, and when the *fi. fa.* issued plaintiff herein waived notice of seizure as such third possessor. The record also shows due advertisement of the seized property and the appointment of an appraiser by plaintiff, who acted in his behalf in the appraisal of the property, and further shows that he was present at the sale, bidding on the property, and, after sale and adjudication thereof to defendant Hebert, vacated the portion of the land in which he was in possession as third possessor, delivering possession thereof to the adjudicatee, Hebert. In view of the foregoing facts plaintiff can not attack the validity of the proceedings leading up to said sale, nor the title of Hebert resulting from the adjudication of said property to him, because by his acts and conduct, manifested in every preliminary leading up thereto in which he took an active part, he induced all others to believe that there was and could be no objection to the proposed sale. In the 5th R. 523, this court held that "there are cases in which a man may innocently be silent; but in other cases a man is bound to speak out, and his very silence becomes as expressive as if he had openly consented to what was said or done and had become a party to the transaction. Thus, if a man having a title to an estate, which is offered for sale, and knowing his title, stands by and encourages the sale or does not forbid it, and thereby another person is induced to purchase the estate under the supposition that the title is good, the former, so standing by and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase." In the 12th An. 838, Mullen vs. Follain, the informalities urged were:

1. Want of notice of seizure and notice to appoint appraisers.
2. Want of sufficient description of the property seized and sold.

HARVARD LAW LIBRARY

3. That the seizure was excessive.

These informalities were deemed sufficient by the District Court to annul the sale, but on appeal to this court it was held erroneous, "because all the alleged defects, so far, at least, as they were proven, were cured by the conduct of plaintiff himself. He appeared at the sale, made no opposition thereto, bid himself on the property, thereby encouraging others to bid, and gave up possession of the whole premises as sold by the sheriff to the purchaser, Follain. If under such circumstances he could attack the sale, there would be little security for bidders who might be misled by the act of parties whose property is exposed to public sale." 36 An. 774. The plea of estoppel herein filed against plaintiff was well taken, and the judgment of the lower court maintaining it, is correct.

The ruling of the lower court excluding evidence as to whether the purchaser at said sale paid the purchase price or not, is correct. It does not appear that plaintiff has any right to question that fact; he is not an heir of John Hayes, and is without interest in the proceeds of said sale. Besides which, the return of the sheriff on the execution, and the sheriff's deed, recite that the purchaser did pay the purchase price in cash to the administrator of the estate of John Hayes, which fact is admitted by the latter in his answer herein, and is not denied by any person in interest; therefore, as a third possessor of property seized and sold to satisfy a previous mortgage, and having no actual interest in the distribution of the proceeds of the sale, plaintiff has no right to question whether the adjudicatee, Hebert, paid the sheriff the purchase price of said property, or how he complied with the terms of sale. O. P. 15; 36 An. 774.

For these reasons we are of the opinion that the judgment of the District Court, maintaining the pleas of estoppel and the exceptions of no cause of action and of no right of action, filed by all said defendants, is correct and supported by authority, and is therefore affirmed.

Rehearing refused.

W. C. PERRAULT, District Judge, was called in to try this case.

McENERY, J., absent this term.

BREAUX, J., recused.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT NEW ORLEANS,

IN

NOVEMBER, 1894.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. LYNN B. WATKINS, HON. SAMUEL D. MCENERY, HON. JOSEPH A. BREAUX, HON. HENRY C. MILLER.	}	<i>Associate Justices.</i>
---	---	----------------------------

No. 11,621.

STATE OF LOUISIANA VS. JOHN JONES ET AL.

1. The District Judge should, in all cases where parties are indicted for murder, charge the jury under Art. 785 of the Revised Statutes "that on all trials for murder the jury may find the prisoner guilty of manslaughter." *State vs. Brown*, 40 An. 725. *State vs. Brown*, 41 An. 411.
2. The discovery, through a confession, of facts legally admissible in evidence tending to show a defendant guilty of the charge against him, would not render admissible the confession itself if it was not voluntary and free from compulsion or inducement.

A PPEAL from the Tenth Judicial District Court, Parish of Avoyelles. *Coco, J.*

M. J. Cunningham, Attorney General, and Phanor Breazeale, District Attorney, for Plaintiff and Appellee.

46	1395
50	154
51	245
48	1395
104	45
46	1395
113	781
46	1395
117	116
117	468

State vs. Jones et al.

Joffrion & Joffrion and *A. J. Lafargue* for Defendants and Appellants.

The opinion of the court was delivered by

NICHOLLS, C. J. John Jones and Henry Simmons, having been convicted of murder and sentenced to death, have appealed.

The record shows that during the progress of the trial certain confessions made by Henry Simmons were, over the objections of the defendants, permitted to be testified to and go to the jury, and that in his charge to the jury the District Judge, in instructing them what verdicts they could render under the indictment, failed to include that of manslaughter, and that upon his attention being called by counsel of accused to the omission of one verdict which could be returned under an indictment for murder, he stated to the counsel that he had thought of that but that he did not think such a verdict would be applicable to this case.

It is claimed that it was not shown that the confessions referred to were voluntary and not free from fear of harm and from inducement; also claimed that it was the duty of the court to have informed the jury before retiring that, under the laws of Louisiana, in all trials for murder the jury may find a verdict of manslaughter. A question has been raised as to whether the counsel requested the judge to include a "verdict of manslaughter" as a verdict allowable under a charge of murder, and as to whether the accused reserved a bill of exceptions to the course pursued by the judge. We find a bill of exceptions bearing on this subject which we will first transcribe, and then comment upon the situation of the case viewed from the recitals of that bill. The bill states that "on the trial of the case, while the judge was completing his charge to the jury, one of the defendant's counsel rose and stated to him 'that he omitted to inform the jury that they could also render a verdict of manslaughter,' and the judge answered: 'I have thought of that, but in this case it can not be done.' Whereupon counsel said: 'We only call attention to this omission of your Honor to protect our rights.' The omission of charging the jury that they could bring a verdict of manslaughter also had a tendency to prejudice defendants' case."

To the above the court added:

"The court refused to charge the jury as aforesaid for the following reasons:

State vs. Jones et al.

"The counsel in this case made no request that I charge the jury that they could return a verdict of manslaughter, nor did they reserve a bill in this respect. What happened was simply this: After the jury received their instructions from the court, counsel remarked to the court 'that the jury had not been instructed as to one verdict they might render in the case.' 'I remarked to counsel that I had thought of that, but I did not think such a verdict would be applicable to this case.' To this counsel shrugged his shoulder and simply remarked: 'Well, I thought I would mention the matter to your Honor,' but he never asked for the special instructions nor reserved a bill. He did not even suggest what the additional verdict was, but I concluded it was manslaughter, as I had not instructed the jury that they could return such a verdict. I did not do so because, such an instruction could only have confused the jury and would have necessitated an elaboration upon questions of law not involved in the case at all. It was a case of absolute waylaying in the night, and the questions incident to sudden affray and combat did not, in fact, nor could they be invoked as an element of defence. I think it is the duty of the trial judge to eliminate from the case all issues not pertinent to it, and which are calculated to draw the attention of the jury from the main facts. Self-defence, insanity and excusable homicide are special defences which need not be discussed save when specially made. I have given the above to show that under no possible theory of the defendants could they plead injury, from the failure of the court to instruct the jury that they could return a verdict of manslaughter. Their defence was not that the killing was done under heat of blood, but that they did not do it at all.

"The murder was an atrocious one, and could not have been justified under any pretext, nor was any attempt made to justify it. Both defendants attempted to locate themselves at places different from the one where the homicide was committed, and that was their sole defence." To which ruling of the court the defendants' counsel at the time stated, they wanted said charge made to protect their rights, and excepts to said ruling, and tenders this his bill of exceptions to be signed by the judge, which is done. This bill as so written we find signed by the judge. It is inartificially drawn and it is difficult to understand from it precisely what did occur at the time of the giving of the charge. The case before us is one involving the lives of two persons, and we are inclined to give to the accused the

State vs. Jones et al.

benefit of all the doubts in favor of the bill of which it is fairly susceptible. We have affirmatively shown to us, over the signature of the District Judge, a state of facts of so fundamental and radical a character that we can not shut our eyes to it, even though in bringing them to our notice the rules of practice may not have been conformed to with strict technicality. That the judge, in charging the jury, omitted to include a verdict of manslaughter as an allowable verdict on all trials for murder; that this omission was called to his attention by counsel, and that that omission was intentional, and that the judge stated to the counsel, who called his attention to the omission, that such a verdict would not be applicable to this case, are facts which the District Judge himself admits.

It may be fairly assumed from the reading of the bill that this last statement was made to counsel in presence of the jury.

With this condition of things in the lower court shown to us, can we permit the judgment to stand? We think not. We are of the opinion that on all trials for murder it is the duty of the District Judge *ex proprio motu*, without request from counsel, to charge the jury that among the verdicts which they are permitted by law to return, under an indictment charging a person with murder, is a verdict of manslaughter, as much so as to inform them that under an indictment for murder it is lawful for the jury to qualify their verdict by adding thereto "without capital punishment," and that it is reversible error in any case that the judge should have failed to so inform them. And if this be so, how much stronger is the case where a judge not only fails to give such information, but expressly declares that in the case before him such a verdict would not be applicable.

The law in this State positively prohibits the judge in a criminal case from expressing an opinion upon the evidence, and the declaration made by the judge was in direct violation of that prohibition.

This court has on several occasions been called on to express an opinion as to the duty of district judges in respect to informing the jury what verdicts they can return in a murder case.

Among the cases we refer to State vs. Brown, 40 An. 725; State vs. Brown, 41 An. 411.

The accused did not ask in this case that any special charge, peculiarly and particularly applicable to it, be given. They did not assume as existing, certain facts, and ask the court from that state of

facts (facts entirely outside of any evidence in the case) to charge the jury as to the law which would be applicable, if such facts had really entered at all in the matter before them.

Counsel did not come down at all to the merits of this particular case—to its facts—or to any theory upon it. Substantially they ask the court to tell the jury, not that on the trial of this cause, and because of any particular features connected with it, that a verdict of manslaughter could be returned by the jury, but that on *all trials* for murder such a verdict could be returned. That being the law, the judge should have so instructed the jury. The question of injury, as resulting from the judge's course, does not enter as a factor in the matter. The duty of the judge was absolute and mandatory, and his failure to perform it, fatal.

In the examination of this subject we noticed a sentence in the opinion in State vs. Jackson, 45 An. 1035, which, read alone and not in connection with the recited pleading and facts of that case, might be misleading, and to which, we think it not amiss therefore to refer.

In that case, which was one of murder, the District Judge had, in point of fact, charged the jury generally upon the law of manslaughter, but declined to give a *special* instruction asked.

In our opinion we said that "there was nothing in the case at bar, under the statement of facts as given, upon which the court could have been called upon to charge upon the law of manslaughter, and to make his refusal to do so ground of refusal." The sentence should properly read: "that there was nothing in the case under the statement of facts as given, upon which the court could have been called upon to make the *special* charge asked, upon the law of manslaughter, and to make his refusal to do so ground of refusal."

The conclusions we have reached upon this particular branch of the case would necessitate a reversal of the judgment, and the remanding of the case, without discussion or mention of other questions involved in it, but in view of another trial, it is proper that we should refer to the confessions made by Henry Simmons, which are the subject of several bills of exception.

The first bill of exceptions was reserved by *both* defendants. It appears from it that the State, through one W. B. Marshall, a witness upon the stand, proposed to place before the jury a confession of Henry Simmons, one of the accused, and that defendants objected on the ground which we have already stated, but that the objections

State vs. Jones et al.

were overruled and the confession went to the jury. The circumstances under which this confession was made are thus stated by counsel to have been made by the witness. He (witness) and a number of men armed with guns and Winchester rifles arrested Simmons, who was asked how the killing was done. Simmons stated that Henry and Van Washington had done it. He (witness) told him, "Now you had better tell the truth and not tell a lie." Simmons at the time was in apparent fear and trembling, and then and there he told them that he, Simmons, and John Jones had killed the deceased.

The judge makes the following statement upon the bill: "Marshall (the witness) stated that he and two others had arrested Henry Simmons and that they were at the time armed, but he said that they had made no threats against the life of Simmons, nor had they offered to do him bodily harm, nor had they made any hostile demonstration however (whatever). That they offered him no inducements, or favors or immunities. That he, Marshall, had asked Simmons who had done the killing, and that Simmons had answered that Henry Washington and Van Washington had done it. Marshall then said to him: 'Henry, you'd better tell the truth and not lie about it.' Simmons was not bound in any way, and had not even been arrested. He then told Marshall that he and John Jones had done the killing. Marshall testified that he then concluded to take Simmons to a party of men who had in the meantime arrested John Jones, and he did so. Simmons was then taken, and his hands were bound together and a rope placed around his neck. Whilst in that condition he repeatedly made statements of his guilt, which were, however, all excluded, and it was only after the crowd had concluded not to do him violence, and had decided to turn him over to the authorities, that he might be legally tried, and after they had actually started with him to Marksville, the parish seat, that his confessions, to which P. J. Coco, E. D. Coco, John George and others testified, were admitted.

"His first confessions were contradictory, but in his last he gave the details of the killing with such particularity, which circumstances subsequently corroborated so thoroughly, as to leave no doubt as to the verity of the statement."

The second bill of exception is leveled at the action of the court in permitting the testimony of one John George, touching a confes-

sion made in his presence by Henry Simmons, to go to the jury over objections of the same character as those mentioned in the first bill.

Counsel in this bill state that it was reserved by "defendants' counsel," but the judge states that this particular bill was taken by counsel of Simmons only.

The third bill, the judge states, covers objections to the testimony touching *the same confession which had been testified to by John George*, but as testified to by different witnesses (Paulin J. Coco and Edouard D. Coco).

Counsel state in the second bill that this confession was made to P. J. Coco and others before going to the woods, whilst they were all armed. That whilst the witness George had offered no inducement or made no threats, yet others had done it a short time before to extort said confession, which had previously been excluded for said reasons. They objected that a confession extorted through inducement or threat can not be received in evidence when made to a person who had arrived after said threats had been made or inducements offered, and that any confession made after that time is not voluntary.

The court overruled this objection, stating that the confession was made at a different time and place, and under circumstances totally different from those under which the excluded confessions were made. This confession was made under no offer of violence, threats or immunities, and when the parties who had charge of the accused had decided to turn him over to the authorities, and whilst the prisoner was being taken to the parish seat. No confessions made by the defendant whilst the attitude of the mob was menacing, and whilst he may have apprehended bodily harm, were received in evidence. The one received was made by him voluntarily and under no improper influences.

In the third bill the defendants assert that Paulin J. Coco and Edouard D. Coco testified that the confession was made while a number of men armed with guns and Winchester rifles had Henry Simmons under arrest, and whilst coming from the woods with Simmons, who had his hands tied and a rope around his neck. That whilst such was the situation, Simmons broke out in a laugh, saying he would have more time to meet the "Old Man," and that Simmons then said also that he and John Jones had waited until midnight under an oak tree near by for the deceased to pass by in order to

State vs. Jones et al.

kill him. That this was on the Thursday night previous to the killing, and that on Sunday night he (Simmons) had shot Bond and missed him and Johnnie Jones had finished him, and they maintain that this confession was not voluntary and free from fear or inducements.

The judge, in overruling the objection, said: "This is the confession testified to by John George and others, and it was made under the circumstances stated in the bill of exceptions to George's testimony."

The District Judge differs in his statement of facts and in his conclusions from the counsel of the prisoners. Were we imperatively called upon in this case to pass now upon the admissibility of the confessions in evidence, we would be forced (inasmuch as the testimony of John George, Paulin Coco and Edouard Coco is not in writing) to be guided by the statements of the judge.

In view of this difference and of the ordering of a new trial, at which the testimony will be taken *de novo*, and matters then placed, we hope, in such a shape as to present this question before us, should it arise again, free from any conflict between the judge and the counsel, we do not feel at liberty to dispose of it as matters stand. The exact details of the situation when each of the confessions took place, the connection of the parties present at the time the one was made with those present at the time the other was, the continuity of events or the break of the continuity, the intervals between the confessions, the places where each was made, the order in which they were made—everything, in fact, tending to show the circumstances under which the confessions were made, should be clearly brought out and recited. Mere conclusions of fact should not be depended upon or sent to us on which we will be expected to base our decision.

There is one matter connected with the bills which has attracted our attention and to which we think it proper to refer.

In the first bill of exceptions the District Judge passes outside of the particular confession then before the court to another confession made by Simmons, and in respect to this he says that in it "he gave the details of the killing with such particularity (which circumstances subsequently corroborated so thoroughly) as to leave no doubt as to the verity of his statement."

If the District Judge, in reaching his conclusions as to the admissi-

State vs. Wright.

bility of the confessions, was influenced by the consideration that "the facts detailed in them were found subsequently to be so corroborated as to leave no doubt as to the verity of the statement," he committed an error. The discovery through a confession of facts, legally admissible in evidence, and tending to prove a defendant guilty of the charge against him, would not render admissible the confession itself, if it was not voluntary and free from compulsion or inducement. The question at that time before the court in this case was the admissibility of the confession, not its truthfulness. *Yates vs. The State*, 1 S. W. Reporter, 65.

Before closing this opinion we feel it our duty to allude to the "minute entries" in this case. They are carelessly and imperfectly made. The minutes of each day should show exactly what took place in the case on that day, and the District Clerk is not justified in making, to cure prior defective entries, a general entry on the last day of the trial "that the accused was present from the beginning to the end of the trial."

The number of judgments which this court has been forced to reverse and remand by reason of defective records calls upon us to urge upon District Attorneys the necessity of their giving personal supervision each day to the entries made in criminal cases by the clerks.

For the reasons herein assigned, it is ordered, adjudged and decreed that the verdict of the jury be set aside, and the judgment thereon rendered be and the same is hereby annulled, avoided and reversed, and that the cause be remanded to the lower court for further proceedings according to law, the parties charged to remain in custody.

No. 11,590.

THE STATE OF LOUISIANA VS. JANUARY WRIGHT.

1. The principle attempted to be announced by a party indicted for murder in a requested special charge to the jury that "even if the killing be proved and that the prisoner at the bar did it, that does not permit the law or the jury to presume malice" is stated entirely too broadly and, as stated, was correctly refused.
2. After a general charge to the jury, in which the court had fully instructed it as to what constituted the crime of murder, including a full definition of express and implied malice, and the manner of proving it, and that it was incumbent on the State to prove all the necessary elements going to constitute

State vs. Wright.

the crime of murder, as defined beyond a reasonable doubt, a special charge was given to the effect that "from the mere proof of the killing by the accused, malice is not to be presumed as a matter of law or by the jury, but where the facts and circumstances of the killing are placed in evidence before the jury, and there was no accompanying palliating or extenuating circumstances, the jury may infer malice." *Held*: That through the general and special charge the jury was fully and properly advised as to the law, and as to its duty in the case.

A PPEAL from the Eighteenth District Court, Parish of Lafourche.
Caillouet, J.

M. J. Cunningham, Attorney General, and *B. F. Winchester*, District Attorney, for Plaintiff and Appellee.

John S. Billiu for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, charged with murder, was found guilty and sentenced to death. The appeal taken presents to us but one single question.

Counsel of the accused asked the court to charge the jury that "even if the killing be proved, and that the prisoner at the bar did it, that does not permit the law or the jury to presume malice."

The bill of exceptions states that "the court refused to give the charge, in the words quoted, and a qualified charge was given, whereupon counsel reserved this bill, and submitting same to the attorney for the State and found correct was given to the court."

The court added to the bill the following words:

"The court gives the requested charge with the following modification and in the following language: 'Formerly it was the law that the proof of the killing by the accused raised a presumption of malice, but such is no longer the law; that from the mere proof of the killing by the accused, malice is not to be presumed as a matter of law or by the jury, but when the facts and circumstances of the killing are placed in evidence before the jury, and there are no accompanying palliating or extenuating circumstances, the jury may infer malice.'

"This qualified charge (says the judge) is to be taken in connection with the general charge, which was not excepted to, in which

State vs. White.

the court had fully instructed the jury as to what constituted the crime of murder, including a full definition of express and implied malice and the manner of proving it; and that it was incumbent on the State to prove all the necessary elements going to constitute the crime of murder, as defined, beyond a reasonable doubt. The evidence showed a killing without any extenuating circumstances."

As the bill is drawn the objections of the appellant seem to be directed to the refusal of the judge to charge exactly, in the words of the counsel, rather than to the correctness of the charge as actually given. We think the charge as requested to be made was correctly refused to be given. The idea which counsel intended to convey was, as stated in the proposed instruction to the jury, calculated to mislead it. The principle attempted to be announced was entirely too broadly stated.

Assuming, however, that the bill was designed to reach the charge as actually made, we do not think that appellant has any ground of complaint.

We think the instructions to the jury such as were approved by this court in *State vs. Trivas*, 32 An. 1090.

In that case the court, after referring to the fact that at one time it was held that from the mere proof that a deceased person had been killed by the accused, malice is presumed by the law from the fact of killing, that declared "experience in criminal practice has compelled the courts of this country to modify and materially relax the vigor of the common law rule on this point; and recognizing that frequently the excuse for the deed apparent on the evidence offered to prove the homicide, the courts have shaped the rule so as to conform with undeniable experience. These mild and able modifications were considered and adopted by our immediate predecessors in the case of the *State vs. Swayze*, 30 An. 1323, and we shall now be guided by the rule which requires the judge to charge that malice is presumed from the proof of the homicide when such proof is unaccompanied by circumstances of extenuation.

"The jury may be instructed to weigh and consider all the circumstances arising from or connected with the evidence proving the homicide, and that the presumption of the innocence of the accused must yield to the presumption of malice or deliberate intent only when the evidence is unaccompanied by circumstances showing alleviation, justification or excuse."

Dry Goods Company vs. Giddens et al.

The general charge was not required to be given in writing nor excepted to and is only referred to in a general way by the District Judge in the bill of exceptions.

We have every reason to believe that through the general charge and the special charge given to it, the jury was fully advised of the law in the case.

Judgment affirmed.

No. 11,529.

LAFAYETTE BANK OF ST. LOUIS VS. ALGIERS BREWING COMPANY.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

McENERY, J. Appeal dismissed.

46b1406
46 1497
46b1406
50 218

No. 11,481.

A. S. B. PIOR, TUTOR, VS. D. M. GIDDENS ET AL.

A PPEAL from the Ninth District Court, Parish of Red River.
Hall, J.

This case is controlled by Rawlins vs. Giddens, *ante*, 46 An. 1136.
NICHOLLS, C. J. Remanded.

No. 11,482.

FLORSHEIM BROS. DRY GOODS COMPANY, LIMITED, VS. GIDDENS ET AL.

A PPEAL from the Ninth Judicial District Court, Parish of Red River. *Hall, J.*

This case is controlled by Rawlins vs. Giddens, *ante*, 46 An. 1136.
NICHOLLS, C. J. Remanded.

State ex rel. Lamothe vs. Judge.

No. 11,440.

STATE OF LOUISIANA VS. VINCENT & HAGAN.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

The issues same as involved in State vs. Williams, *ante*, 46 An. 922.
McENERY, J. Judgment affirmed.

No. 11,400.

THE STATE OF LOUISIANA VS. DASYLVA COURCIER.

A PPEAL from the First Recorder's Court, City of New Orleans.

This case is controlled by decision in State vs. Dasylya Courcier,
No. 11,399, *ante*, 46 An. 907.

NICHOLLS, C. J. Appeal dismissed.

No. 11,110.

EDWARD FREDERICH AND CHAS. DURRIEU VS. SOUTHERN ELECTRIC
AND MANUFACTURING COMPANY.

A PPEAL from the Civil District Court, Parish of Orleans.
King, J.

This case only involved questions of fact.

The opinion of the court was delivered by
NICHOLLS, C. J.

No. 11,583.

STATE EX REL. A. M. LAMOTHE VS. N. H. RIGHTOR, JUDGE.

In case a judicial sequestration, as an incident of a real action, is dissolved, and the plaintiff is left under the restraint of an injunction forbidding him to collect rents *pendente lite*, there is such probability of resulting injury therefrom that he is entitled to a *mandamus* to compel the allowance of a suspensive appeal from such interlocutory decrees.

State ex rel. Lamothe vs. Judge.

APPPLICATION for a Writ of *Mandamus*.

Edwin Laizer and Gabriel Fernandez for Relator.

Albert Voorhies for Respondent.

The opinion of the court was delivered by

WATKINS, J. The object of this application is to compel the respondent to grant relator a suspensive appeal from certain interlocutory judgments that he rendered in a certain suit pending in his court.

The respondent returns that he granted the defendant an injunction restraining plaintiff from collecting rents of the real property in controversy during the pendency of the suit; and also granted plaintiff a judicial sequestration of said rents and revenues, and directed the sheriff to collect and retain the same.

That the plaintiff moved for the dissolution of the injunction, and the defendant moved for the dissolution of the sequestration; and that he maintained the injunction and quashed the sequestration.

He further returns that as the plaintiff—relator here—had “no apparent right of possession better than his principal’s—the defendant—and as these were, consequently, interlocutory orders, not working an irreparable injury,” he refused to grant relator a suspensive appeal from said decrees.

The record brought up in the original shows that the relator brought suit for the revocation and annulment of certain alleged donations of certain valuable improved real estate, situated in the city of New Orleans—the rental value of which was estimated at one hundred and twenty dollars per month—on the ground of ingratitude on the part of the donee and for other causes. To this demand the defendant answered, and averred that she held title to the properties in controversy, regular in form, and for which she paid a valuable and adequate consideration—disavowing said alleged donations.

Upon this real action were engrafted, by supplemental proceedings, the defendant’s injunction to restrain plaintiff from collecting rents, and plaintiff’s judicial sequestration, requiring the sheriff to collect same *pendente lite*.

State vs. Clark et als.

It is evident that the revenues were an incident of the suit, and the party decreed to be owner would ultimately be entitled to them.

Whether the judge improvidently granted and, consequently, properly quashed the sequestration, and correctly granted and refused to dissolve the injunction, are questions which are not of present concern; but the question is whether those decrees, interlocutory though they be, are of such a character that injury *may* result therefrom to the plaintiff as relator. Code of Practice, 566; State *ex rel.* James L. Cole vs. Judge, 29 An. 803; Hyde vs. Jenkins, 2 La. 427.

In our opinion they are. If plaintiff remains under the operation and restraint of the injunction forbidding him to collect the revenues of the property during the pendency of the suit; and plaintiff can not obtain any relief from the decree dissolving his judicial sequestration directing the sheriff to collect and hold same for account of the successful party in the suit, he, necessarily, is placed in the situation of taking the risk of losing same notwithstanding he might win the suit.

We are of opinion that this is a proper case for the allowance of a suspensive appeal and that the relator is entitled to relief.

It is therefore ordered that the preliminary *mandamus* be made peremptory, commanding the respondent to grant the suspensive appeal requested and he be taxed with costs.

No. 11,592.

46 1409
48 1482

STATE OF LOUISIANA VS. PHIL. CLARK ET ALS.

The certificate of the Assistant Secretary of State is competent evidence of the date of the promulgation of a law.

A PPEAL from the Nineteenth District Court, Parish of Iberia.
Voorhies, J.

M. J. Cunningham, Attorney General, for Plaintiff and Appellee.

A. & Charles Fontelieu for Defendants and Appellants.

State vs. Clark et als.

The opinion of the court was delivered by

WATKINS, J. Phil. Clarke, Richard Wilson, Martin Jones, Julien Mallet and Edward Isaacs were indicted for a conspiracy to commit the crime of murder, and the last two, having been convicted and sentenced to imprisonment in the penitentiary, have appealed.

They rely on the following bills of exception for relief, viz.:

One taken to the refusal of the judge to quash the general *venire* of jurors, on the ground that the law whereunder the same was drawn had not, at the time same was drawn, been fully promulgated and was not in force; and one taken to the judge's refusal to permit counsel for the defendants to introduce in evidence a certificate of the Assistant Secretary of State for the purpose of showing the date of the publication of said act.

The grounds on which the motion to quash are predicated are fully stated in the brief of defendants' counsel, and we have made an extract therefrom as the most exact way of presenting his views. viz.:

"That on the 5th day of July, 1894, the jury commissioners, acting under Act No. 44 of 1877, proceeded to draw, and did legally draw, a general *venire* for the term of court to be held on the 3d day of September, 1894, which general *venire* was duly published according to law in the official journal of the parish of Iberia.

"That no order was issued, nor could such an order issue, canceling, vitiating and quashing the said general *venire* drawn on the said 5th day of July, 1894.

"That on the 6th day of August, 1894, acting under a pretended Act No. 89 of 1894, an order issued from this Honorable Court appointing jury commissioners, and ordering the said commissioners to meet at the court house in New Iberia in order to draw a general *venire* for the said September term of court.

"That the said commissioners did illegally proceed to draw a general *venire*, which were illegally summoned for the term of this Honorable Court.

"That at the time the said order, dated August 6, 1894, was issued by the Honorable Court, the pretended Act No. 89 of 1894 had not been promulgated twenty days in the official journal of the State, and therefore was not a law. That all the acts of the jury commissioners, under the pretended Act No. 89 of 1894, were therefore illegal, null, void and of no effect.

"That the ignoring and setting aside of the legal general *venire* drawn by the jury commissioners on the 5th day of July, 1894, was contrary to law and without warrant and authority."

The foregoing is a literal reproduction of the grounds assigned in one of defendants' bills of exception.

The defendants' motion to quash the general *venire* was filed on the first day of the term, and the grounds therein assigned are the same as those assigned in the bill of exceptions.

The record discloses the facts to be as stated in the motion to quash and the bill of exceptions—the trial judge having, presumably, acted on the presumption that Act 89 of 1894 had repealed Act 44 of 1877, in appointing jury commissioners on the 6th of August, 1894, and ordering them to draw a general *venire* for the September term of court.

If he was correct in that assumption, the defendants' complaint is without foundation. Act 89 of 1894 was approved by the Governor on the 7th of July, 1894; and it declares in terms that Act 44 of 1877 is thereby repealed. Anterior to the approval of the *former* statutes the jury commissioners appointed under the latter had, on the 5th of July, met and drawn a general *venire* of jurors for the September term of court. And the point is made by the motion to quash, and in the bill of exceptions, that at the time of appointing of the jury commissioners on the 6th of August, 1894, Act 89 of 1894 had not been promulgated twenty days in the official journal of the State, and was therefore not a law.

The provision of the Civil Code with regard to the promulgation of the laws, is that "all laws enacted by the Legislature of the State shall be considered promulgated at the place where the State Gazette is published, the day after the publication of such laws in the State Gazette; and in all other parts of the State, *thirty days* after publication." Revised Civil Code, Art. 6. The time required for promulgation is, by the Constitution, reduced to twenty (20) days. Constitution, Art. 40.

The certificate of the Assistant Secretary of State is to the effect "that Act 89 of the regular session of the General Assembly of the State of 1894 was duly published in the official journal of the State of Louisiana on the 22d of July, 1894." Consequently sufficient time had not elapsed between that date and the 6th of August, 1894, for the publication of the act and its promulgation according to law.

Succession of Cauvien.

Objections were made, however, by the State's attorney, to the admission in evidence of the certificate of the Assistant Secretary of State; and the objection having been sustained by the court, the defendants' counsel retained the aforesaid bill and annexed the certificate thereto. The judge assigned no reasons for sustaining the objection and disallowing the certificate in evidence.

The Civil Code provides that the Secretary of State "shall keep a register in which he shall write down the title of all the laws passed by the Legislature, together with the dates when they shall have been respectively published in the State paper; and the register thus kept, or *the certificate delivered from the same*, by the Secretary of State, under his official signature and seal, shall be evidence of the publication of the laws," etc. Revised Civil Code, Art. 6; Revised Statutes, Sec. 3493.

The Secretary of State is authorized to appoint an Assistant Secretary of State. Revised Statutes, Sec. 3522.

And the Assistant Secretary of State "is fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State," etc. Revised Statutes, Sec. 3523.

It is evident that the certificate of the Assistant Secretary of State was competent evidence for the purpose for which it was offered, and that rejecting it was error on the part of the trial judge, which entitles the defendants to relief.

It is therefore ordered and decreed that the verdict of the jury thereon based be annulled and set aside, and it is further ordered that the cause be remanded to the lower court, and the sentence of the court for the purpose of a new trial in accordance with law and the views herein expressed.

No. 11,513.

SUCCESSION OF MRS. E. L. CAUVIEN, WIDOW OF ANTOINE O. DEGRUY,
DECEASED.

46 1412
2114 617

1. The charge that a subscribing witness to a will did not hear the dictation of the testatrix is disposed of by the statement that he could hardly hear her talking because she was very sick.
2. The charge that a subscribing witness could not understand or speak the French language is disposed of by proof that the testament was dictated and wholly written in the English language.
3. The purposes of the law are subserved by proof that the language employed by the testatrix was fully understood by the notary, and faithfully expressed in the testament as written by the notary.

Succession of Cauvien.

4. To meet the requirement of the law, the proof, administered on a charge that a certain phrase of the testament was not, in point of fact, dictated by the testatrix, must be sufficient to overcome the sanctity that attaches to a *quasi* official record, and the legal presumption that is thereon raised, in favor of the truthfulness of its recitals, and the just performance of an official act by a public officer.

A PPEAL from the Twenty-first District Court, Parish of Jefferson
Rost, J.

J. Numa Augustin and Charles P. Drolla for Testamentary Executor, Defendant and Appellee:

The will is the repository of the deliberate intentions of the testator.

The cardinal rule for the interpretation of wills is to ascertain the intention of the testator and to give effect to it when ascertained. Succession of Burnside, 35 An. 708, 715.

It is the identity of thought and not of words that the law requires.

Starr vs. Mason, 32 An. 9; Gidden vs. Ex. Burke, 35 An. 179.

The act of the notary receiving the will in presence of witnesses is an authentic act, and it makes full proof of what is contained in it. Segur vs. Segur, 12 An. 25.

Proof to set aside a will is admissible, but it must be peculiarly strong to overcome the presumption resulting from the authentic act; and the testimony of the witnesses themselves, who have given their solemn attestation to the completion of the required formalities, is entitled to little weight to set aside a will. Succession of Young, 11 An. 65; Starr vs. Mason, 32 An. 9; Major vs. Eynault, 7 An. 52.

"The prohibition of external proof prying into the testator's intentions in making the will, the requirement of the rigid observance of formalities, showing by the will alone that the intention is that of the testator and not of anybody else; the authenticity of the instrument, protecting the intention thus manifested for all time, from the treacherous memory or the fraudulent contrivance of witnesses." Cross on Succession, p. 183.

An act with the testimony of the notary and the witnesses is not overcome by conflicting testimony, some of which goes to show that the testator was not sufficiently acquainted with English to make a will in that language. Starr vs. Mason, 32 An. 9; Landry vs. Tomatis, 32 An. 120.

Succession of Cauvien.

Where the evidence shows that the party attempting to nullify a will was herself the only party who offered to explain to the notary what was said to him by the testatrix, and the notary did put down all the intentions of the testatrix as expressed by her, with a due regard to identity of thoughts and not of words, the will can not be invalidated nor nullified. *Hamilton vs. Hamilton*, 6 N. S. 146; *Starr vs. Mason*, 82 An. 11.

Thomas S. Ellis for Plaintiff and Appellant.

The opinion of the court was delivered by

WATKINS, J. This suit has for object the annulment of the will of the decedent, Mrs. DeGruy, upon the following grounds, to-wit:

1. That one of the witnesses to the testament, Mr. Wilbrug Huguet, did not *hear* the dictation of the testatrix because of the indistinctness of her articulation when speaking to the notary.

2. That another of the witnesses, James Rostrup, was totally ignorant of the French language, in which the testatrix partially dictated same.

3. That, as the testatrix partially dictated the testament in the French language, which the notary did not understand, the services of an interpreter were called into requisition.

4. That the clause in the body of the will dispensing the executor from giving bond was not dictated by the testatrix to the notary in the presence of the witnesses.

5. That the instrument was not voluntarily dictated by the testatrix, but its provisions were suggested to her—she merely acquiescing therein by monosyllables.

The answer of the defendants—the forced heirs, legatees and testamentary executor having been made parties—was a general and special denial. After hearing and considering the testimony of a number of witnesses, and amongst them that of the notary and the three attesting witnesses, the District Judge reached the conclusion that plaintiff's case was not made out and rejected her demands, and maintained the will as legal and valid.

We have read the briefs with care and attentively examined all the evidence, and both briefs and evidence have impressed our minds with the correctness of the conclusions of the judge *a quo*.

Succession of Cauvien.

This is the case of an old lady making a will in the nuncupative form by public act, while *in extremis* lying on her death bed, and manifestly suffering great pain, though perfectly rational and conscious of her acts.

The first two grounds may be disposed of with the simple statement that the subscribing witness Huguet, as a witness in this case, said that he "could *hardly* hear her talking because she was very sick;" and although the subscribing witness Rostrup could not speak a word of French, the will purported to have been dictated in English, and is wholly written in that language. Each of these subscribing witnesses signed the testament, and, on the stand as witnesses, do not disavow their signatures. These facts thoroughly dispose of these two grounds of complaint.

With regard to the third ground there is quite a contrariety of statement, the preponderance of which, however, favors the defendants' theory—the substance of the testimony being that the testatrix dictated her wishes in broken English, which was understood by the notary and subscribing witnesses, and was by the notary correctly expressed in the testament.

Five of the witnesses testifying in this case unite in making the statement that the testatrix dictated her will in broken English, but did it understandingly and intelligibly.

The notary testifies that the entire dictation of the testatrix was in English, but that he had occasion to make a pause now and then, and repeat to her some of the words and inquire what she meant, and to his questions she would reply: "Yes, that is correct."

He states, emphatically, that he took the dictation of the testatrix only, and after writing each paragraph he read it over to her, in order to make sure that he was right.

The notary could neither speak nor write the French language, and the testament is in the record—brought up in the original—and is wholly written in the English language.

There is not one of the witnesses who states that the testatrix could not speak the English language, except the plaintiff; and in this she is contradicted by her sister, Mrs. Henry A. Harvey. On this subject the record says:

"Q. Mrs. Harvey, you are a daughter of Mrs. DeGruy?

"A. Yes, sir.

"Q. You were present at the time of the taking of her will by William J. McCune, the notary?

Succession of Cauvien.

"A. Yes, sir; I was.

"Q. Did your mother speak English or French?

"A. English.

"Q. How did she speak English?

"A. Broken English.

"Q. Sufficiently well to be understood?

"A. Everybody always understood her."

Again:

"Q. And Mr. McCune repeated it to your mother?

"A. Yes, sir.

"Q. Your mother spoke broken English?

"A. Yes, sir.

"Q. Did she speak it frequently?

"A. All of the time. We always had ladies that came to the house that spoke English."

The plaintiff, as a witness, is contradicted by her brother, Horace DeGruy. On this subject the record says:

"Q. Mr. DeGruy are you a son of Mrs. Onezime DeGruy that lately died?

"A. Yes, sir.

"Q. How many languages could your mother speak?

"A. She could speak French and broken English.

"Q. Did she speak broken English in such a way that you could understand what she was saying?

"A. She could speak good enough for anybody to understand her."

These positive statements are confirmed by several witnesses who had been intimately acquainted with the testatrix many years.

The judge *a quo*, in our opinion, satisfactorily disposes of the fifth complaint of the plaintiff, to the effect "that the testament was not voluntarily dictated by the testatrix, but its provisions were suggested to her, she merely acquiescing in monosyllables." On this subject his judgment declares:

"That if, as alleged in the petition, the will was not written down by the notary in the very words dictated to him by the testatrix, the evidence goes to show that the plaintiff herself was the only party who offered to explain to the notary what was said to him by the testatrix; (but) that the notary did put down all of her intentions as expressed by her, with a due regard to identity of thoughts and not of words. 6 New Series, 146; 32 An. 11."

Freiberg & Bro. vs. Langfelder.

The foregoing expressions embody our views fully. With reference to the phrase in the will appointing an executor and dispensing him from bond, the charge that it was not dictated by the testatrix, is not supported by the evidence; it does not overcome the sanctity that attaches to a *quasi*-official record, and the legal presumption that is thereon raised in favor of the truthfulness of its recitals, and the just performance of an official act by a public officer.

Judgment affirmed.

No. 11,487.

BOLAND & GSCHWIND VS. SLIDELL BRICK AND TILE MANUFACTURING COMPANY, LIMITED.

A PPEAL from the Sixteenth Judicial District Court, Parish of St. Tammany. *Reid, J.*

All parties in interest filed in open court an agreement for a consent judgment.

The opinion and decree was delivered by
MCENERY, J.

No. 1278.

ISAAC FREIBURG & BRO. VS. A. LANGFELDER.
MRS. PAULINE LANGFELDER, INTERVENOR.

A PPEAL from the Fifth Judicial District Court, Parish of Ouachita.
Richardson, J.

The plaintiffs appellants.
Appeal dismissed.

No. 1288.

SAME VS. SAME.

A PPEAL from Fifth Judicial District Court, Parish of Ouachita.
Richardson, J.

46 1417
117 245

State vs. Smith & Co.

Defendant and Intervenor Appellant.

The opinion of the court was delivered by

MCENERY, J. In a *dation en paiement* the thing transferred to the wife must bear a just proportion in value to the amount due the wife. A sale is an entirety, and there is no contract where there is no agreement as to the price. If the property transferred to the wife exceeds appreciably the debt due her, she can not be permitted to retain a part of the property transferred and remain a creditor to the community for the difference.

No. 11,392.

STATE OF LOUISIANA VS. HENRY FRIED ET AL.

APPEAL from the Second Recorder's Court, City of New Orleans.

The issues same as in State vs. Sarodat *et als.*, ante, 46 An. 700.

MCENERY, J. Judgment affirmed.

No. 11,439.

STATE OF LOUISIANA VS. EMILE ALGEYER & Co.

APPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

The issues same as involved in State vs. Williams, ante, 46 An. 922.

MCENERY, J. Judgment affirmed.

No. 11,494.

STATE OF LOUISIANA VS. MASON SMITH & Co.

APPEAL from Civil District Court, Parish of Orleans.
Monroe, J.

 State vs. Beck.

The facts and principles of law involved are the same as in *State vs. Williams*, *ante*, 46 An. 922.

Judgment of District Court reversed.

The opinion of the court was delivered by
MOENERY, J.

No. 11,639.

STATE VS. ERNEST BECK.

The word *feloniously* following the word wilfully in an indictment under Sec. 792, Revised Statutes, is surplusage and meaningless. The judge, therefore, is not required to charge the jury as to its meaning.

Where evidence as to the overt act is contradictory, and the preponderance of evidence is against it, the trial judge is necessarily clothed with authority to decide whether it has been proved in order to lay the foundation for the introduction of evidence as to character.

A PPEAL from the Fifth Judicial District Court, Parish of Ouachita.
Potts, J.

M. J. Cunningham, Attorney General, and *J. P. Madison*, District Attorney, for Plaintiff and Appellee.

Gunby & Sholars for Defendant and Appellant.

The opinion of the court was delivered by
MOENERY, J. The defendant was convicted under Sec. 792, Revised Statutes, for wilfully shooting at one Lee Tillman.

The indictment charges that the defendant "did then wilfully and feloniously assault one Lee Tillman by then and there wilfully and feloniously shooting at the said Lee Tillman."

After the trial judge had fully charged as to the statutory offence, defendant's counsel requested him to define what was meant by "feloniously," as used in the indictment. The trial judge declined to do so. His ruling was correct.

The offence is charged fully by the use of the word "wilfully."

46 1419
47 90
46 1419
113 802

State vs. Beck.

The word "feloniously" employed in the indictment was unnecessary and without meaning.

There was then no reason why the trial judge should explain its meaning to the jury. State vs. Watson, 41 An. 599.

Counsel for defendant offered to prove the character of Tillman to show that he was a dangerous man, and had a bad reputation for peace and quiet.

From the statement of the trial judge, appended to the bill of exception, it appears that there was no hostile demonstration made by the person assaulted against defendant.

There is a variance as to the facts between counsel and judge. Under the repeated rulings of this court we accept the statement of the latter.

It is as follows: "The testimony [of the five witnesses—Lee Tillman, Stephen Thomas, Wm. Sampson, Robert Webster and Marion Boley—who were present, and all who saw the shooting, showed that there were harsh words used and angry feelings generated between Lee Tillman and Ernest Beck about 10 o'clock A. M., before the shooting, which occurred about 12 or 1 o'clock. At the dinner recess at the saw-mill, where they were working, the defendant went home, armed himself with a pistol and returned. Tillman, with the five witnesses, was sitting where they had eaten dinner. He had in his hands a pocket knife, with which he had eaten, and was at the time whittling upon a stick. Ernest Beck approached about twenty-five feet and called Tillman, saying he wished to see him. Tillman refused to go. A second time he was called upon and refused to come. Some mutual bantering then took place, in which Tillman stated, 'If you don't go off I will come, and when I come I will cover you.' Tillman did not start toward Beck at that time, but sat still and cursed him. Beck then drew his pistol from his bosom, and as Tillman arose from, or as the witnesses expressed it, 'slid down from his seat,' Beck hollowed to the crowd to get out of the way, and fired. Tillman ran from Beck, and when about twelve or fifteen feet from where he was sitting, Beck fired again at Tillman while running.

"It is true that the defendant himself testified as stated in his bill, but is contradicted by all other witnesses who were present."

The trial judge evidently believed all the witnesses rather than the sole testimony of defendant. In such a case he is necessarily clothed

State ex rel. Vietor & Acheles et als. vs. Judge.

with the authority to decide whether a proper foundation had been laid for the introduction of evidence as to character. State of Louisiana vs. Ford, 37 An. 443; State of Louisiana vs. Harris, 45 An. 843; State vs. Green,* *infra*.

From the statement of the trial judge it appears that the defendant was the aggressor.

Judgment affirmed.

No. 11,603.

STATE EX REL. VIETOR & ACHELES ET ALS. VS. HON. FRED. D. KING,
JUDGE CIVIL DISTRICT COURT, PARISH OF ORLEANS, DIVISION "B."

It is too late to intervene in attachment proceedings to obtain a reversal of an interlocutory order for the preservation of the property after the order has been granted and the conservatory process fully complied with.

APPPLICATION for a Writ of *Mandamus*.

Dinkelspiel & Hart, Joseph N. Wolfson and Lazarus, Moore & Luce
for Relators.

E. Howard McCaleb for Respondent.

The opinion of the court was delivered by

McENERY, J. The relators allege that they are creditors of Karl Kuhn and had instituted suit against him by attachment; that when their suits were instituted the property was under seizure at the suit of the Peoples Bank, also under attachment proceedings; that on October 22, 1894, the Hon. F. D. King, judge Division "B," Civil District Court, parish of Orleans, on the application of the Peoples Bank, issued an order to sell the property attached as perishable; that the defendant was absent and unrepresented on the trial of the rule, the judgment in which was to sell the property after five days' advertisement; that all the attachment suits are pending and undetermined; that the rule and the judgment rendered thereon were improvident, because there was no power in the court to order a sale of said property in advance of judgment unless the goods were perishable, which petitioner alleges are not; that the court was with-

*See Index.—REPORTER.

State ex rel. Vietor & Acheles et als. vs. Judge.

out authority to order the sale after five days' advertisement, and without notice to relators.

They applied for a suspensive appeal from the judgment on the rule, which was denied. They pray for relief by *mandamus* proceeding.

The return of the respondent judge shows that the rule was granted on the application of the Peoples Bank, and served on defendant, who made no appearance; that after hearing evidence he granted the order for the property to be sold after due appraisal and five days' advertisement; that the relators have not made themselves parties to the suit between the Peoples Bank and Karl Kuhn by intervention or otherwise, so as to set up any adverse interest to the plaintiff thereon, nor have they alleged and proved in the lower court that they are aggrieved by said order of sale, and are therefore incompetent to appeal from the said interlocutory order; that the plaintiff prosecuting said suit, the Peoples Bank of New Orleans, has not been made a party to these proceedings as required by Art. 846 of the Code of Practice, and before the order granted herein was signed, issued or served, the said property had already been sold, disposed of and delivered by the sheriff to the purchasers.

We have omitted a part of the respondent judge's statement in his answer, which alone would be sufficient to deny the relief prayed for, but the attorneys for relator state the rule of court to be, or rather as they allege the custom to be, not to file motions until granted by the judge. As we are not in possession of the rule or the evidence of the custom, we will say nothing about this part of the respondent's answer.

Article 261, Code of Practice, provides for the sale of perishable property on the application of the plaintiff after the usual advertisement.

The relators deny that any evidence was offered as to the perishable nature of the property, and the attorney for the respondent asserts with equal emphasis that this is a reckless statement. Be this as it may, the respondent judge states that the rule was regularly tried, and we will presume he had ample authority upon which to base his interlocutory order.

The advertisement may not have been of sufficient duration, but of this defect only the defendant in attachment could urge, as the suits of relators were filed after the order to sell was granted, the

 Succession of Saux.

property sold and the vendees placed in possession. It is too late to intervene in attachment proceedings to obtain a reversal of interlocutory orders for the preservation of the property, after the order has been granted and the conservatory proceedings fully complied with.

The relators are most assuredly without interest to appeal from said order, decreeing the property to be sold because of its perishable nature.

The relief prayed for is denied at relator's costs.

 No. 11,515.

SUCCESSION OF JACQUES SAUX.

The nuncupative testament by public act must make authentic proof of its execution in accordance with Art. 1578, Civil Code, and Art. 1579, when the testator is incapable of signing his name.

The notary must expressly mention that the will was dictated by the testator and written by the notary as dictated, and the reading of the will to the testator in presence of the witnesses.

No express mention is required of the signing of the will, except in the contingency provided for in Art. 1579, Civil Code. It is essential to the validity of the nuncupative will by public act that the formalities of dictation, and reading the will in presence of the witnesses and testator be expressly mentioned in the body thereof, and all fulfilled at one time, without interruption or turning aside to any other act; but it is not imperative that the notary shall declare in the will that the formalities were done at one time and without interruption. If he fails to declare this essential requisite to its validity, the party attacking the will must show the interruption.

In receiving the will as dictated by the testator, the notary may interrogate him as to his exact meaning, provided no suggestions are made which result in changing the intentions of the testator.

Where an uneducated person dictates his will in the idiom peculiar to the uneducated, it is no ground for nullity that the notary writes the will in polite language, provided the exact meaning of the testator is preserved.

A PPEAL from the Civil District Court, Parish of Orleans.
Theard, J.

Albert Voorhies for Plaintiff and Appellant.

Chas. Louque and *Frank McGloin* for Defendant and Appellee.

The opinion of the court was delivered by
 McENERY, J. Jacques Saux, the deceased, executed the following open or nuncupative will by public act:

Succession of Saux.

"In the city of New Orleans, in the State of Louisiana. On this 20th day of the month of January, 1898, I the undersigned, George Magner Barnett, notary public, duly commissioned and sworn, in and for the city and parish of Orleans therein residing, and in presence of the witnesses hereinafter named and undersigned, at the request of Mr. Jacques Saux, I attended him at his domicile, situated at the corner of Salcedo and St. Ann, Second District of this city, where I found the said Jacques Saux unwell, in the front chamber of said domicile, sick in body, but well in mind, in memory and in will as he appeared to me notary, and to the hereinafter named and undersigned witnesses; and the said Jacques Saux requested me to receive his last will and testament, which I, notary, have written with my own hand, word by word and as he dictated it to me in presence of Messrs. Alexander Bordes, Michel Montant and Paul Bezot, domiciled in this city and called as witnesses to the present testament of the following tenor:

"I declare that I am named Jacques Saux, and that I am about forty-nine years of age. I declare that I am married to Justine Auguste, of which marriage there is no issue. I declare that both my father and mother are dead.

"I give and bequeath to my said wife, Justine Auguste, all my goods, movables and immovables, which I may leave at the time of my death, and I name as my testamentary executor my said wife, Justine Auguste, to whom I give all the necessary powers to carry into execution the testament. I revoke all testaments or codicils which I have made before this, which alone I declare to contain my last wishes.

"It is thus that this testament has been dictated to me by the said testator in presence of the said witnesses, and I have written it as it has been dictated to me by the said testator, in their presence and this at once, without interruption and without turning aside for other acts, and the undersigned notary having read the said testament to the said testator in the presence of the said witnesses in a loud and intelligible voice, he has declared in their presence that he has heard it well, that he understands it well and that he therein finds well expressed his last wishes in which he persists.

"This done and passed at the domicile aforesaid, the day, month and year as above, in presence of the witnesses above named, who have signed with said testator and me, notary, after reading same."

(Signatures)

Succession of Saux.

The will was dictated in French and the above is a translation of the same.

It is attacked by a sister of the deceased on the following grounds:

First. It does not state that the testator signed in the presence of witnesses; nor, secondly, that the witnesses signed in the presence of the testator; nor, thirdly, that testator and witnesses signed in the presence of the notary; nor, fourthly, does it contain express mention that all the formalities, including the reading of the will and the signing by the testator, witnesses and notary, were fulfilled at one time without interruption and without turning aside to other acts.

It is further assailed on two other grounds, *dehors* the instrument itself: first, that it was not dictated as a matter of fact; and, second, that it was the result of pressure, duress and intimidation.

There was judgment rejecting the demand of plaintiff at her costs, from which she appealed.

Article 1578 of the Civil Code requires the nuncupative testament by public act to be received by a notary public in the presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place.

This testament must be dictated by the testator and written by the notary as dictated.

It must then be read to the testator in presence of the witnesses.

Express mention is made of the whole, observing that all these formalities must be fulfilled at one time without interruption and without turning aside to other acts.

It is well settled that the nuncupative will by public act must make full proof of itself, and must bear upon its face the evidence that all the formalities required by law for its validity have been complied with. These formalities, if not apparent on the face of the will, can not be supplied by evidence *aliunde*. Succession of Clement Wilkin, 21 An. 115.

The above will on its face shows that all the formalities required by Art. 1578, Civil Code, have been complied with. It shows that the will was dictated by the testator and written by the notary as it was dictated; that it was read to the testator in presence of the witnesses.

These are the material facts of which express mention must be made. There is nothing said in the article about signing, of which express mention should be made. If the will, therefore, has been improperly

Succession of Saux.

signed, it is upon plaintiff to show it. But the will on its face discloses the fact that it was signed by the testator, the witnesses and the notary at the same time, and in the presence of each other. No more explicit language could be used than that employed by the notary when he closed the will by stating that the witnesses "signed with said testator and me, notary."

It is contended by plaintiff that the word "received," employed in the article, means that the notary must, in the presence of the requisite number of witnesses, complete the entire testament, including the signing by testator, notary and witnesses. But in the case of *Langley's Heirs vs. Langley's Executors*, 12 La. 114, to which plaintiff refers, the Supreme Court said that the word meant the dictation of the will in the presence of the witnesses, and the reading of the same to the testator and the witnesses in the presence of each other.

In *Keller and others vs. McCalop and another*, 12 Rob. 639, it is decided that the express mention referred to in Art. 1578, Civil Code, refers to the preceding formalities, which are the dictation of the will in the presence of the required number of witnesses and the reading of the same to the testator in the presence of the witnesses. And as this case bears a strong resemblance to that, we will use the language of the opinion as applicable to this. "It results from the whole context of the instrument that it was executed in the only way it was physically possible it could be done in relation to the time at which the several things necessary to its completion were performed—*id est*, that it was first dictated, then written, afterward read, and finally signed."

The Art. 1578 of the Civil Code requires all the formalities herein referred to should appear upon the face of the will, and that they should be fulfilled without interruption and without turning aside to any other act.

But the direction that they should be fulfilled at one time and without turning aside to any other act need not be expressed in the will. If this requirement has been neglected it is upon plaintiff to show it. This has been the settled jurisprudence since the case of *Featherstone vs. Robinson*, 7 La. 599. It was affirmed in *Keller and others vs. McCalop and another*, 12 Rob. 639; the cases cited, and in the late case of *Succession of Murray*, 41 An. 1109.

In the last case cited we said: "The final charge is that all the

Succession of Saux.

legal requisites were not done at one time and without turning aside to other acts. It is a sacramental requirement of the notary that he shall make 'express mention of the whole,' but not that he shall declare that all these formalities had been fulfilled at one time and without turning aside to other acts." R. C. C. 1578. His failure to make such a declaration in the will is not a ground of nullity. 7 La. 599; 12 R. 639. That article only refers to the formalities therein mentioned. All of these formalities seemed to have been fulfilled at one and the same time, and the act furnishes no proof that he turned aside to other acts. There is no evidence of his having prepared any other act. So, in this case all the formalities required by Art. 1578 of the Code appear from the face of the will to have been performed at one time without turning aside to other acts, and there is no evidence to the contrary. Express mention is made of all the formalities required by the article, but the notary omits to positively state that the reading of the will to the testator and the witnesses was without interruption, although a reasonable interpretation of his language leaves this impression.

The cases referred to by plaintiff do not conflict with the views herein expressed. The doctrine announced in them is that the will by public act must make full proof of itself in showing that all the formalities necessary to give it validity must appear upon its face, and express mention must be made of the formalities required by Art. 1578 of the Code. Not one of them pronounces the will a nullity because the notary has failed to declare that he had fulfilled these requirements without turning aside to other acts.

This last requirement is essential to the validity of the will, but its non-fulfilment must be shown by the party attacking the will. *Keller vs. McCalop*, 12 Rob. 639.

The testimony does not show that there was any coercion used to force the testator to make his will. On this point there is a total failure of proof.

The pleadings admit that the will shows that it was dictated by the testator and written as dictated by the notary, but it is urged that the language employed by the notary was not that of the testator. The testimony attempts to show that the testator was not an educated Frenchman and did not speak the language in its purity. Also that the notary interrogated the testator. The testimony shows that the testator spoke French sufficiently well to be clearly understood. If

Henry vs. Creditors.

the notary took down his exact meaning and clothed it in more elegant language than that used by the testator, it is certainly no grounds for avoiding the will.

There could be but trifling variation in the words used, and no perversion of the meaning of the testator. *Hamilton vs. Hamilton*, 6 N. S. 146.

The inquiries made by the notary were not suggestive of any disposition by the testator, but had reference only to get at his exact meaning, and when ascertained the language was taken down in the meaning of the testator, but in good French. The inquiries were not calculated to alter or change the intentions of the testator, and therefore are not sufficient to invalidate the will. *Starrs vs. Mason*, 82 An. 8.

Judgment affirmed.

No. 11,519.

JOHN HENRY VS. HIS CREDITORS.

46 1428
50 322

The ten days allowed by law for the filing of opposition to the appointment of a syndic begin to run from the day on which the proceedings had before the notary are closed.

The insolvent for illegal votes cast affecting his discharge must file an opposition within the prescribed ten days.

A PPEAL from the Civil District Court, Parish of Orleans.
Theard, J.

Rice & Armstrong for Roberts, Exceptor and Appellee.

Joseph Maille and *Louis P. Paquet* for John Henry and Bernhard Meyer, Opponents and Appellants.

The opinion of the court was delivered by

MCENERY, J. John Henry made a cession of his property on December 27, 1893. The meeting of creditors convened on the 17th January, and closed on the 29th of the same month. A syndic was elected at this meeting of the creditors.

The notary failed to file the *proces verbal* of the creditors' meeting as required by law. He was forced to do so by the syndic.

It was filed on February 7th, and on the 10th February, Bernhard

Conway vs. Railroad Company.

Meyer, claiming to have been elected syndic, and John Henry the insolvent, claiming to have been discharged, filed opposition—the former, in so far as they appear to elect said Willard Roberts as syndic, to annul the order granted to Roberts, and to appoint him, said Meyer, without bond, as mentioned in the *proces verbal*; the latter, the insolvent, that certain votes be annulled and stricken from the record.

There is nothing on the face of the record that suggests the absolute nullity of the proceedings before the notary, which would authorize an attack upon it at any time.

The ten days allowed by law for filing oppositions to the appointment of a syndic commence to run from the closing of the meeting of creditors. *Dreaux vs. Creditors*, 2 N. S. 57; *Goodale vs. Creditors*, 8 La. 128; *Guerin vs. Creditors*, 2 La. 358; *Spears vs. Creditors*, 40 An. 652; *Harrison & Bro. vs. Creditors*, 42 An. 1055; *Bonner vs. Beard*, 43 An. 1139; Revised Statutes, Sec. 1802.

The fact that the notary failed to file the *proces verbal* in court does not dispense with the filing of the opposition within the time prescribed by law. The insolvent proceedings are before the court, and there is no reason why the opposition can not be presented before the *proces verbal* is filed. Sec. 1802, Revised Statutes. Besides it was within the power of the opponent to have compelled the notary to have filed the *proces verbal* immediately after the closing of the meeting of creditors.

It is contended that the insolvent can file an opposition showing votes illegally cast to his injury. There is no reason why he should not be required to file his opposition within the prescribed time. If the votes cast against him are illegal, their illegality must be shown prior to the judgment of homologation. This judgment closes all objections to the meeting of creditors, and it is evident therefore that he must, like other creditors, file his objections within the prescribed ten days from the final closing of the meeting of creditors.

Judgment affirmed.

No. 11,516.

P. J. CONWAY VS. NEW ORLEANS & CARROLLTON RAILROAD
COMPANY.

46 1439
50 322

Plaintiff's wife was not at fault in leaving the car.
The evidence proves that she was injured by the negligence of defendant's employé.

Conway vs. Railroad Company

The conductor put the car in motion before the passenger had time to step off, and as a consequence she was thrown from the step, fell to the ground and was injured; it is negligence for which the defendant company is liable for damages. Liability by the principal arises when the servant is acting within the scope of his employment.

Plaintiff is entitled to compensatory damages.

A PPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

Morris Marks and A. H. Leonard for Plaintiff and Appellee.

John M. Bonner for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. Plaintiff sued to recover damages sustained by his wife in a fall from one of defendant's street cars.

About 6:30 P. M. in the evening of March 20, 1893, she, with her daughter, on their way to her residence, notified the conductor that they wished to leave the car at Third street.

He alleges that the conductor failed to stop at Third, and that she was carried to Burthe street, where the car was stopped that they might leave; that immediately she proceeded to leave and was on the step in the act of getting off, when suddenly and without warning the car was put in motion, and, as a consequence, she was thrown from the step and fell violently to the ground; that she sustained severe injury, which caused pain, suffering and permanent physical disability.

The answer is a general denial.

The case was tried before a jury and a verdict for \$1000 was rendered against the defendant. From a final judgment entered upon the verdict, the defendant appeals.

The facts are substantially as follows:

That the car stopped, as alleged, at Burthe instead of Third street, and that plaintiff's wife was thrown to the ground from the steps while attempting to step down; that her daughter was standing on the platform and saw her mother fall; that she said to the conductor that in the stops he should allow the passengers time to alight; that the car was put in motion without having given these passengers time to step out and leave without injury.

Conway vs. Railroad Company.

To this point of the case the testimony of plaintiff's witnesses is uncontradicted.

The defendant introduced a witness who testified that no woman fell from the car on the day alleged while he was conductor. He left the car at 6 o'clock, prior to the accident. The conductor who succeeded him in running the car was not introduced as a witness.

We therefore have before us, in so far as relates to the fall, only the testimony of plaintiff's witness.

The attending physician testifies that she called at his office in a suffering condition; that her right hip was severely bruised, and she, in consequence, had high fever and suffered other ills; that he treated her more than three weeks, and that during several months she was unable to work. Most of the time, while under treatment, she was confined to her bed.

That she suffered no permanent injury.

As to the cause of one of her ills the testimony of her physician is contradicted by another physician called in by the defendant as an expert, who did not find any possible connection between that ill and the bruises as described.

BILL OF EXCEPTIONS.

To the ruling of the lower court, permitting evidence as to the number and age of plaintiff's children to go to the jury, the defendant reserved a bill of exceptions on the ground of irrelevancy.

As partner in community the husband sued for damages in the loss of the services of his wife to himself and their children. The number of plaintiff's children may be the cause of more seriously feeling the loss, and in consequence it is admissible in evidence in assessing the *quantum* of damages.

In any view of the question, it is not of sufficient importance, and has not such bearing upon the issues, as to justify the court to remand the case. *Interest republicæ ut sit finis litium.*

ON THE MERITS.

That the plaintiff has a just claim on the defendant company for some damages, is made evident by the un rebutted testimony of the witnesses.

The bruises received by his wife from the fall may not have been

Conway vs. Railroad Company.

as severe as represented; but they, it is proven, were quite painful and forced her to seek medical treatment and remain confined to her bed.

The negligence charged possibly was not as gross as is contended by the plaintiff; the facts remain proven that the cars hastily moved without giving plaintiff's wife time to step down from the steps, and that she was violently thrown down by the sudden and unexpected movement.

There was no fault shown on the part of the plaintiff's wife in getting off at the street named.

It was for her to determine at which stop of the car to alight, and for the conductor to offer ample time to leave with safety. There is no testimony whatever before us toward justifying the employees of the defendant's company. These passengers must have been seen by them, as they were both moving to get off in their presence while the car was stopped.

We do not overlook the fact that, in justice to their fellow passengers who have not arrived at their destination, those leaving should not take up too much time.

There is no complaint on that score made against plaintiff's wife and her daughter.

The community clamor for rapid transit and corporations generally comply with the public demand in this respect. To this there can be no serious objection as long as the service is safe.

But in all cases, even at the expense of speed, women and children, at any rate, should be given time to alight and not be exposed to accidents.

With reference to the damages, we do not agree with the verdict of the jury as to the amount.

The negligence for which the company is liable is not gross and malicious.

It is nevertheless liable for compensatory damages. In answer to the proposition by counsel that a corporation can not be mulcted in damages for the wilful wrongs of its servants and their illegal and oppressive conduct, we quote from *Denver & Rio Grande Railway vs. Harris*, 122 U. S. 597: "A corporation is liable *civiltiter* for torts committed by its servants," though it did not authorize the act, if within the scope of the servant's employment.

Under the circumstances, the amount is fixed at five hundred

State vs. Smith.

dollars, for which amount we find ample support in our jurisprudence. The damages allowed are compensatory.

It is therefore ordered that the judgment appealed from be amended by reducing the amount to five hundred dollars, with legal interest from date of the judgment of the District Court, and that as amended the same be affirmed, appellee paying the costs of appeal.

No. 11,609.

STATE OF LOUISIANA VS. GUS. SMITH.

46 1433
113 730

The charge defined forgery and instructed the jury that to find the accused guilty they ought to infer an intent to defraud the person whose signature was forged. The judge did not err in refusing to charge as requested. There was substantially no difference between the charge as given and the instruction requested by the accused.

The receipt alleged to have been forged was in due form, and, if genuine, would have been proof in court of payment.

It was the subject of forgery.

A motion for a new trial should be made before sentence.

The accused had requested the court to pass sentence.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Potts, J.

— — —
M. J. Cunningham, Attorney General, for Plaintiff and Appellee.

— — —
Gunby & Sholars for Defendant and Appellant.

— — —
The opinion of the court was delivered by

BREAUX, J. The accused, charged with forgery and sentenced to two years' imprisonment in the State penitentiary, complains that the judge refused to instruct the jury, as follows:

First. The mere false making, without an interest to defraud some one, does not constitute the crime of forgery.

Second. The intent to defraud is the very essence of the offence.

Third. To constitute forgery the instrument when forged must be such as would tend to prejudice the rights of another, and such in law as would be available to work the intended fraud or injury, the distinguishing characteristic being the crafty fraud and deceit whereby it is intended to injure some one.

State vs. Smith.

He complains also that the court erred in refusing to permit the filing of a motion for a new trial.

The verdict of the jury had been rendered.

His counsel had the accused brought into court and sentenced.

Afterward the accused made affidavit and motion for a new trial and offered the motion for filing. To the court's refusal a bill of exceptions was reserved.

The indictment charges that the defendant feloniously forged a certain receipt for two dollars with intent to defraud, and especially to defraud S. Dickerson and Linton Carney. Said receipt represents that the accused had paid the amount of money to Dickerson for account of Carney, the accused Smith having feloniously and fraudulently signed the name of Dickerson to the receipt.

In the bill of exceptions reserved to the court's refusal to charge as requested, the trial judge inserted the statement that the charges had substantially been given.

He adds that he, nevertheless, proceeded to give to the jury the first and second charges asked in substantially the same words as those asked and embraced in the bill of exceptions, but that he stated to defendant's counsel that as to the third, he thought the correct doctrine was embraced in the decision in the *State vs. Dennett*, 19 An. 385, which had already been read by the court to the jury as a correct exposition of the law, and refused to charge as asked by counsel.

The judge says that he had substantially given the charge requested.

The defendant did not request a written charge.

Under well settled jurisprudence the judge's statement of the facts, in the absence of all evidence to the contrary, must be considered as true.

This completely disposes of charges Nos. 1 and 2, given by the court without any modification.

As to the third charge, it seems from the judge's subsequent statement, incorporated in the bill of exceptions, that he withheld at least a part of it from the jury and relied in lieu on the doctrine embraced in the case cited *ubi supra* as being a correct exposition of the law.

In that case (*State vs. Dennett*, 19 An. 395) the court refused to charge the jury that "the State must show that the check charged to have been forged by the prisoner and the signature thereto affixed

State vs. Smith.

sufficiently resembled the genuine check and signature of the drawer to deceive persons of ordinary business observation, or it was not forgery." (The ruling was sustained on appeal.)

The court said in that case: "That a jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him."

And lastly, it is announced in the case in question that, if there be at any time any possibility of fraud, it is enough to constitute the offence.

The first part of the requested charge reads: "To constitute forgery, the instrument when forged must be such as would tend to prejudice the right of another."

The equivalent doctrine from the decision in question was charged, "that a jury ought to infer an intent to defraud the person who would have to pay the instrument."

In the case at bar it was not a check that was forged, but a receipt which ordinarily speaking could be used in evidence for the defence in a suit brought by the person whose name was forged. Wharton, 9th Ed., Vol. 1, p. 692.

In the language of the decision, the jury were instructed that they "ought to infer an intent to defraud the person who would have to pay the instrument," *i. e.*, in the case under consideration, to defraud the person in whose name the forged receipt was made.

The remainder of the requested charge reads:

"And such in law as would be available to work the intended fraud or injury, the distinguishing characteristic being the crafty fraud and deceit whereby it is intended to injure some one."

The utterances in *State vs. Dennett*, 19 An. 395, are not absolutely similar to the requested charge. They have application to the case and sufficiently instructed the jury.

There is no essential difference requiring that the verdict be annulled and the case remanded for another trial.

Taking the charge as a whole all the elements constituting the crime of forgery as applying to a forged receipt were explained to the jury.

The counsel for the defendant argue another principle of law—*i. e.*, that the receipt forged could be of no legal efficacy if it were a genuine instrument.

State vs. Dubuclet.

The defendant delivered the receipt for a stated amount in currency and with this receipt attempted to satisfy a debt of his by committing the forgery alleged.

Had his act been legitimate and not fraudulent, the collection would have been made and the receipt would have evidenced a legal payment. The receipt would have had legal efficacy. Making the receipt and signing to it the signature of the creditor, and delivering it to the debtor, and at the same time stating to the debtor that he had procured the receipt by paying the creditor and thereby seeking to obtain release from the payment of his own debt, was intended to have legal efficacy, and would have had that efficacy if it had not been forged.

The defendant also complains of the court's refusal to permit the filing of a motion for a new trial.

The records disclose that the motion was made after the sentence had been pronounced.

There is nothing in the affidavit of the accused for a new trial showing that he did not have time to prepare his motion for a new trial. Such a motion should be made before sentence and not after sentence.

There is nothing taking this case out of the ordinary rule requiring that motions for new trial be filed and decided prior to sentence. The State of Louisiana vs. Eugene Offutt, 38 An. 364.

It is therefore ordered that the sentence and judgment of the court *a qua* be affirmed.

No. 11,588.

STATE OF LOUISIANA VS. RODOLPH DUBUCLET.

The State moved for a change of venue.

The motion was filed and taken under advisement.

The minutes show that the prisoner was present.

The motion was not served and no action was taken upon it by the accused or his counsel.

On the day following the motion was granted.

The minutes do not show that the accused was present.

Although for the purpose of the decision on the motion, his presence was not necessary to establish that he had consented to the change of venue by his silence or by not taking a bill of exceptions at the time to the ruling of the court.

There was no contradictory hearing on the application to remove the cause.

State vs. Dubuclet.

The signature of the accused to the bond to obtain his release is not a waiver of notice of the motion filed for a change of venue nor can it have the effect of a consent to the granting of the motion without evidence and contradictory hearing.

It is not a case of insufficiency of notice of the motion for a new trial and insufficiency of evidence on the trial of the motion, but of absolute want of either, and of the absence of contradictory hearing and all note of evidence.

A PPEAL from the Fourteenth District Court, Parish of West Baton Rouge. *Talbot, J.*

M. J. Cunningham, Attorney General, and *Alexander Hebert*, District Attorney, for Plaintiff and Appellee.

Talbot & Hebert and *Yoist & Claiborne* for Defendant and Appellant cite 70 Ill. 171; Wharton, Cr. Pr. 602; 37 An. 443; Wharton, Cr. Ev. 458, 459; 2 An. 921; 15 Ill. 515; 12 Kan. 622; Bishop, Cr. Pr. 71.

The opinion of the court was delivered by

BREAUX, J. The defendant was indicted for murder.

He was found guilty of manslaughter.

He appeals from the sentence and judgment condemning him to serve ten years at hard labor in the State penitentiary.

He was indicted in the parish of Iberville, in which parish, the jury having twice failed to agree, two mistrials were entered.

On the 24th of October, 1894, the accused was in court when the District Attorney filed a motion for a change of venue; no grounds were assigned; it was taken under advisement by the court.

On the morning following it was sustained, and the court issued an order permitting the accused to furnish bond for his appearance before the District Court for the parish of West Baton Rouge.

His bond was forfeited in that parish and his sureties paid the amount of the judgment.

In March, 1894, the case having been called for trial, the defendant through counsel interposed an exception on the ground that the change of venue was granted on the mere motion of the District Attorney.

The court in overruling the exception gave as reason, that the

State vs. Dubuclet.

question of change of venue had been determined and no bill of exception was reserved on the ground of insufficiency of evidence or irregularity of the proceedings, and that it was therefore too late to reopen issues previously decided.

After this exception had been overruled an exception was filed to the jurisdiction of the court on the grounds that the accused was not present in court when the order for a change of venue from the parish of Iberville to that of West Baton Rouge was granted.

The court overruled this exception also, and gave for reason that the minutes of the court show that the accused was present when the motion for a change of venue was taken up, and that his presence was not necessary when the court granted the order.

The defendant was again placed on his trial. The jury having failed to agree, another mistrial was entered.

In September, 1894, he was tried for the fourth time and at this last trial he was convicted.

Motions for new trial and in arrest of judgment were filed on the part of the defendant and overruled by the court.

WAIVER OR ACQUIESCENCE.

One of the positions on the part of the State is that the accused has acquiesced in the proceeding by not taking a bill of exception. There are many irregularities which the defendant may cure by consent.

An accused may, it seems, waive many of his rights. He is bound by his acts of omission to plead or reserve his legal rights. In judicial proceedings the doctrine of waiver and acquiescence is a necessity.

It devolves upon us to determine whether there was acquiescence in this case.

It is only on the principle of acquiescence or waiver that the order granting the change of venue can be sustained.

As an original proposition it is settled. In *Brouillette vs. Judge*, 45 An. 243, this court held that "an order granted on the simple motion and affidavit of the District Attorney without evidence adduced in support of it, and without opportunity offered to defendants to adduce evidence, is irregular, null and void;" and further, "the nature of the proceedings contemplated clearly involving a contradictory hearing."

In the case at bar there was not a contradictory hearing unless the

State vs. Dubuclet.

presence of the accused on the day that the motion was filed and taken under advisement gives it that character.

With reference to notice and contradictory hearing, the State and the accused should be governed by the same rule. Any notice not sufficient to bind the District Attorney as the law officer of the State in criminal prosecutions would be equally as insufficient to bind an accused in a similar case.

In *State vs. Peterson*, 2 An. 921, under laws relative to a change of venue similar to these now in force, the defendant made a written application for a change of venue on the ground of prejudice in the public mind and supported the application with the required affidavit. The application was notified to the District Attorney, and on the same day filed by the clerk.

It was contended that the District Attorney, by permitting the application to be filed, waived his right to oppose it.

"The practice of the English courts," said this court, "appears to be, after application and oath have been made, to move the court for a rule to show cause why the suggestion of partiality should not be entered on the record as unopposed, in order to have a trial in the adjoining courts. When the rule is made absolute, a suggestion, which is the order of the court for the change of venue, is entered on the record, and this order is not traversable. But this entry is only made upon cause being shown that it is necessary, and upon reasonable notice to the opposite party."

After having cited 1 Chitty Criminal Pleadings, the court adds: "The assent of the District Attorney to the necessity of a change of venue and an order of the court granting it are not to be presumed from the mere fact of permitting application in writing to be filed." When, as in this case, it is the District Attorney who moves for a change of venue, the assent of the accused to the necessity of a change of venue is not to be presumed from the mere fact of permitting application in writing to be filed and immediately taken under advisement.

On the next day, when the order was given in open court removing the cause, the accused was not present.

His absence, of itself, would not have the effect of vitiating a legal order making the motion absolute after having heard the evidence.

But that he did not reserve a bill of exceptions to the order entered in his absence was not a waiver of his right to oppose it, as he

State vs. Dubuclet.

had not been notified of the motion, and there had not been a contradictory hearing.

With reference to evidence and hearing this court said, in *Brouillette vs. Judge*, "that it was formerly the law, under the act of 1868 embodied in Secs. 1021 and 1172 of the Revised Statutes, that the judge might order a change of venue upon the simple application of the State attorney, or of his own motion, whenever satisfied that a competent jury could not be had in the parish. But by Act 95 of 1876 the law was repealed, and in lieu thereof it was enacted: 'That whenever it shall be *established* in any criminal prosecution, *by legal and sufficient evidence*, that a fair and impartial trial can not be had in the parish where the case is pending, the judge of any court having jurisdiction of the case may, upon the application of the Attorney General, District Attorney, or District Attorney *pro tempore*, for a change of venue, grant such application.'

"This statute," says the court in the case (utterances that equally apply in the case at bar), "so obviously contemplates a trial of the issues on evidence to be adduced, including the right of the accused to cross-examine witnesses of the State, and also, if so desired, to produce witnesses in their own behalf, that we are bound to conclude that the learned judge must have inadvertently overlooked its existence."

While it is true that the prisoner may waive notice and hearing, the records do not disclose that one or the other was waived.

It is urged on the part of the State that the defendant in effect gave his consent by signing a bond for his appearance before the District Court in West Baton Rouge.

The bond was not copied in the record. Whatever recitals it may contain they can not be construed as a waiver in a capital case of notice and hearing.

The signing of this bond is not a waiver or an admission of notice of the motion to change the venue and the hearing.

This case is remanded without prejudice to the right of the prosecution to renew the application for a change of venue, and without restricting the court's large discretion in determining whether or not there is ground for change of venue.

However much we regret the necessity of setting aside the verdict and the judgment of the court approving it, we are left no alternative. Our conclusions, not hastily reached, compel us to remand the case.

State vs. Guy.

It is therefore adjudged and decreed that the sentence appealed from be avoided and reversed; that the verdict be set aside and that the case be remanded to the lower court for a new trial according to law; that the order granting a change of venue and removing the cause is rescinded and annulled and the case remanded to the District Court in and for the parish of Iberville without prejudice to any change of venue for which application may be made, and that the accused be held for trial.

No. 11,589.

THE STATE OF LOUISIANA VS. JOHN GUY.

The verdict of a jury in a criminal case will not be set aside and a new trial ordered because the defendant waived the jury and claimed a trial by the court, which was denied by the trial judge; it appearing by the bills of exception the judge approved the verdict. In such case to direct a new trial would be idle.

Nor will such verdict be set aside because the indictment charging assault with intent to murder, notwithstanding the objection of the accused reserved by his bill of exceptions, the question is allowed to be put and answered, that the party assaulted was the town marshal, charged with preserving the peace, the testimony having no tendency to prejudice the accused, and besides admissible to show that the party assaulted was in the peace of the State. 24 An. 29.

The charge to the jury that a peace officer may, without warrant, arrest for breaches of the peace committed in his presence, is correct. 1 Archibald's Criminal Practice and Pleadings, Chap. 2, Sec. 1.

The court reaffirms it has no power to review the rulings of the lower court on applications for new trial in criminal cases, except as to questions of law arising on bills of exception exhibiting the facts on which the legal question is to be determined. 32 An. 854.

A PPEAL from the Ninth District Court, Parish of DeSoto.
Hall, J.

M. J. Cunningham, Attorney General, and *J. B. Lee*, District Attorney, for Plaintiff and Appellee.

H. T. Liverman for Defendant and Appellant.

The opinion of the court was delivered by
MILLER, J. The defendant, sentenced to imprisonment at hard labor, under Sec. 792 of the Revised Statutes, prescribing that punishment for an assault with intent to murder, prosecutes this appeal.

State vs. Guy.

He complains that, waiving his right to a jury trial, he was, notwithstanding his objection, tried and convicted by the jury. The general rule is the trial by jury in prosecutions for crime. The Constitution provides for juries less than twelve where the punishment for the offence charged is not necessarily death or imprisonment at hard labor. Our legislation under that article fixes the number of the jury in that class of cases at five, and authorizes the waiver of the jury in such cases by the accused. Constitution, Art. 7, Act No. 85 of 1880; *State vs. White*, 33 An. 1218. The defendant's offence is not within the scope of the act of 1880. We are, however, relieved from determining whether, in the absence of any statutory or constitutional authority, it is the privilege of the accused to compel the trial by the court for the offence with which he was charged in this case. It is manifest, from the bills of exception embodying the statements of the trial judge, that he concurred with the jury and refused the new trial. It would be idle to set aside the verdict and remand the case to be tried by the judge, when practically the defendant has had the benefit of a trial by the judge as well as the jury.

The assault charged on the accused was committed upon a peace officer engaged at the time in an effort to arrest the accused. The second bill of exceptions is to the questions allowed to be propounded to show the official character of the person assaulted. It is contended on behalf of the accused that not indicted for resisting an officer, no such testimony should have been received. It is not easy to see how showing testimony that the assaulted party was the town marshal could have prejudiced the accused. It would be a refinement at the expense of public justice to set aside verdicts, because a fact is elicited which, even if not pertinent, could have worked no harm to the accused. Besides the testimony tended to show that the assault was on a person in the peace of the State, a formal averment in all indictments. On this ground such testimony was held admissible in *State vs. Warren Denkins*, 24 An. 29.

The third bill of exceptions was to the charge of the court that a peace officer—i. e., a town marshal, may enter a disorderly house to suppress the disorder and arrest the disorderly persons without a warrant. It is the qualification of the duty that the arrest shall not be for past, but for offences under the view of the officer. 1 Archbold's Criminal Practice and Pleadings, Chap. 2, Sec. 1. The charge

State vs. Hirn.

related the circumstances under which the assault was made: the disorderly conduct of the accused in a saloon; that the attention of the town marshal was called to it, thereupon he entered the saloon, requested the accused to stop, which request was disregarded, whereupon the marshal attempted to make the arrest, when the accused made the assault charged. The judge adds the charge was warranted by the evidence, and it was important the jury should know that the officer had the right to make the arrest. We think the charge was pertinent and the principle of law correctly stated.

Lastly, our attention is directed to bill of exceptions No. 4—to the refusal of a new trial. We have no power to review the facts on which the new trial was sought, except so far as they appear in the bill of exceptions. *State vs. Nelson*, 32 An. 842. The defendant submits this bill without argument, only invoking a careful examination of the law. On the facts stated by the judge with great detail, importing that the offence was committed and fully proved, we see no ground for the new trial.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

No. 11,511.

THE STATE OF LOUISIANA VS. JOSEPH HIRN.

The occupation of the barber is mechanical exempted from a license tax by the Constitution, nor is the exemption denied because he employs other barbers in conducting his business. Constitution, Art. 206; 44 An. 1116.

A PPEAL from the First City Court for the Parish of Orleans.
Childress, J.

E. Howard McCaleb, Jr., Attorney for Plaintiff and Appellant.

Carroll & Carroll, on same side.

Felix J. Dreyfous for Defendant and Appellee.

The opinion of the court was delivered by

MILLER, J. The State proceeding by rule seeks to recover from defendant a license tax for conducting the business of a barber.

 Lea vs. Orleans.

The defence is that the State Constitution exempts mechanical pursuits from license taxes, and that defendant, a mechanic, is within the exemption.

That the occupation of a barber is mechanical admits of no dispute. His labor is manual, using with his hands the instruments required for his employment. He comes within the definition of a mechanic and his pursuit has been recognized as mechanical by the decisions of this court. *State vs. Deilenschneider*, 44 An. 1118.

The exemption claimed is denied by the State, because he employs other barbers to assist in serving his customers. We do not perceive that availing himself of the assistance of other barbers takes him out of the exemption. He is still a barber, although working with others. He and they are alike exempt from license taxes.

The State relies on the twelfth section of the license Act No. 150 of 1890. That undertakes to tax mechanics who employ assistance. Thus while the Constitution exempts all engaged in mechanical pursuits, the statute proposes to tax mechanics who employ assistance. This is manifestly contrary to the Constitution and has been so held by this court. *City vs. Bailey*, 35 An. 545; *City vs. Lagman*, 43 An. 1180. We are also referred by the State to the decisions that master builders are not mechanics, although they sometimes themselves do mechanical work. The decisions simply hold that the main occupation of the master builder, liable to a license tax, is not changed to that of a mechanic, exempt from such tax, merely because the master builder occasionally does the mechanic's work. *Tax Collector vs. Conner*, 42 An. 787; *State vs. McNally*, 45 An. 46. These decisions afford no aid to the State in this case.

The decision of the lower court was for the defendant and is affirmed with costs.

 No. 11,615.

W. O. LEA VS. C. A. ORLEANS.

1. Where the issue in a case is not the right of ownership of specific property, but of the possession thereof, it is the value of the latter right which determines the jurisdiction on appeal of the Supreme Court.
2. Where the course of a plaintiff on the trial, the nature of the cause of action and the evidence adduced in the lower court all go to show that plaintiff could not have seriously believed the demand for damages claimed by him would be sustained, the allegations of his petition as to the amount of damages suffered by him are without force in testing the question of jurisdiction on appeal.

48	1444
52	707
48	1444
104	647
48	1444
108	698

Lea vs. Orleans.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Harry H. Hall for Plaintiff, Appellant.

A. B. Philips for Defendant, Appellee.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

NICHOLLS, C. J. In his petition to the District Court plaintiff alleged that he had purchased from the Metairie Cemetery Association several lots of ground in its cemetery for which he had paid cash four hundred dollars; that subsequently he had entered into a contract with Charles A. Orleans to erect a certain tomb upon the lots for three thousand five hundred dollars, of which two hundred and fifty dollars were to be paid upon the completion of the foundations, and the remainder upon the completion of the work; that upon the completion of the foundation he paid the two hundred and fifty dollars as stipulated. That pending the construction it was agreed between Orleans and himself that certain parts of the work should be omitted, and that, in consequence of this change, a reduction of five hundred dollars should be made upon the price. That after the completion of the work he found that some portions were not executed artistically as agreed upon, and he refused to accept it. That about the 1st July, 1893, Orleans agreed to take back said tomb and remove the figure of a lamb, to which he objected, from the tomb, and accept twenty-five hundred dollars in consideration of said removal, in full settlement of all plaintiff's liabilities to him under the contract; and that thereupon he paid Orleans the said amount in addition to the two hundred and fifty dollars which he had already paid, and that after this last payment he owed nothing either to Orleans or to the Metairie Association.

That the tomb being locked and Orleans never having delivered the key of the same, of which he had possession, plaintiff, on or about the 6th July, 1893, sent to him for the key, which he unjustifiably refused to deliver to petitioner, falsely asserting that he had not paid him for the tomb. That petitioner, desiring possession

Lea vs. Orleans.

of the tomb for the purpose of therein interring the body of his deceased wife, sent a locksmith to have said lock taken off and the tomb opened; that the sexton in charge of the cemetery, an employé of the Metairie Cemetery Association, ordered said locksmith to desist and drove him away, refusing to permit him to act as requested by plaintiff, in the premises. That upon petitioner's proceeding to the office of the Metairie Cemetery Association its secretary informed him that he had been requested by said Orleans not to permit him to take possession of the tomb, and announced that he would maintain the sexton in his aforesaid action, and would resist any attempt of petitioner to obtain possession of his property. That the said action of Orleans and of the officers of the association in preventing petitioner from taking possession of his property was an illegal, unwarrantable and outrageous interference with petitioner's rights, and that he had suffered in his feelings by reason of said outrage and in legal and other expenses and attorneys' fees, the sum of two thousand five hundred dollars; and that to be prevented longer from using said tomb for the purpose of placing his wife's remains therein would work him irreparable injury, and that an injunction was necessary in the premises. He prayed for an injunction restraining Orleans and the Metairie Cemetery Association from in any manner interfering with him in the exercise of his rights of ownership in and to his said tomb, and from taking possession of and opening the same; that said injunction be made perpetual, and that he have judgment against the parties restrained for twenty-five hundred dollars damages as above set forth.

The injunction was granted as prayed for and issued upon petitioners furnishing bond and security in the sum of five hundred dollars.

Plaintiff filed subsequently an amended petition, in which he averred that the damages claimed by him were composed as follows:

Attorney's fees, two hundred and fifty dollars; legal costs, one hundred dollars; mechanics, fifteen dollars; suffering to feelings and violations of plaintiff's rights, two thousand one hundred and thirty-five dollars.

Defendant Orleans first pleaded the general issue. He then averred that he received the sum of two thousand seven hundred and fifty dollars, but that plaintiff was still indebted to him in the sum of two hundred and fifty dollars, owing and unpaid, as part of

Lea vs. Orleans.

the price of the tomb. He denied that plaintiff had the right of possession of said tomb until he had paid the price, as stipulated in the contract. He reconvened and prayed for judgment for two hundred and fifty dollars, the amount alleged to be due, for dissolution of the injunction, with reservation of his right to sue for damages.

The Metairie Cemetery Association pleaded the general issue, and prayed to be dismissed.

The court, after evidence adduced and trial on the merits, rendered judgment on the main demand in favor of both defendants, dissolving the injunction and rejecting plaintiff's demand, and on the reconventional demand rendered judgment in favor of the defendant Orleans against the plaintiff for the sum of two hundred and fifty dollars.

The plaintiff appealed to this court. Appellee has filed a motion to dismiss the appeal on the ground that "the court is without jurisdiction, because no proof had been given as to the claim for damages, which was made solely to attempt to vest jurisdiction in this court, and the claim for damages must be held as if never made, and that the sole claim at issue was one for two hundred and fifty dollars, an amount insufficient to give this court jurisdiction."

Appellant maintains that the appeal as taken was well taken, for the reasons: (1) because plaintiff claims two thousand five hundred dollars damages and the allegations of his petition are sworn to, and (2) because the suit for the possession of property of the value of three thousand five hundred dollars is within the jurisdiction of the Supreme Court.

We have, on several occasions, held that in suits for the possession of property the value of the right of possessor, and not the value of the property itself, determines the jurisdiction. *State ex rel. Humphreys vs. Richardson*, 46 An. 133; *In re Genella*, 45 An. 1377.

There is nothing in the record on this point to justify our holding the case. Were we to retain it, our doing so would have to rest upon the other ground, but an examination of the pleadings and the evidence satisfies us that we have no jurisdiction.

It is true that the plaintiff alleged that he was aggrieved by the conduct of the defendant to an amount of twenty-five hundred dollars, and that for the purpose of obtaining an injunction in the case he swore to his allegations; but this matter comes before us on *appeal* after trial, evidence adduced and judgment, and the allega-

Armstrong et al. vs. Railroad Company.

tions of the petition have not the controlling force which plaintiff supposes. The parties to this litigation entered into a contract for the construction of a tomb by the defendant, upon a lot of ground owned by plaintiff, in the Metairie Cemetery. A contention arose between the two as to their respective rights and obligations under the contract. Defendant, holding the key of the tomb, and claiming that he had the right to hold it as evidencing his possession of the tomb itself, until payment, declined on demand of plaintiff to deliver it to plaintiff. On plaintiff's declaration that he would send a locksmith to open the door of the tomb in spite of defendant's holding the key, the latter requested the authorities of the cemeteries to prevent such action, and to this request they acceded. The present suit followed.

We are of the opinion, without going into details, that the plaintiff could not reasonably have set up the claim for damages which he did, and no attempt was made by him in the lower court to support the claim. We do not think it was seriously expected that it would be maintained.

Appeal dismissed.

No. 11,572.

AARON ARMSTRONG ET AL. VS. VICKSBURG, SHREVEPORT & PACIFIC
RAILROAD COMPANY.

46 1448
50 707
46 1448
114 256
46 1448
q123 1086

1. Where five persons unite in an action claiming ten thousand dollars damages against another for malicious prosecution and arrest, based on an affidavit charging them together with a violation of the 758th section of the Revised Statutes, the defendants against whom the judgment has been rendered properly appealed the case to the Supreme Court.
2. There may be illegal opposition and resistance to the execution of the process or order of court, without the application of actual physical force or the use of words. Any conduct which would place the officer executing the order in bodily fear or terror, would be guilty of the illegal opposition and resistance contemplated by the law. Threats may be communicated by signs, by tones of voice, or by actions as fully as by word of mouth.
3. Where upon an affidavit against certain parties substantially true as to its facts, and where a District Judge, learned in law, before whom the affidavit is made, affixes a certain legal character to the acts charged therein, and issues a warrant of arrest as for violation of a particular statute—for acts that fall under that statute—but he subsequently discharged the prisoners under the specific charge by reason of a change of opinion by him as to the fallacy thereunder of the facts stated, the warrant and proceedings thereunder do not furnish the basis for a malicious prosecution and arrest.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Aaron A. Armstrong, J. Van Harper, Isaac J. Brooks, Martin H. Hunnicutt and A. J. Bush join in a petition, in which they pray for a judgment of ten thousand dollars against the defendant company, as damages for a malicious prosecution. The action is founded upon the following allegations:

That on the 28th of August, 1893, they were arrested by the sheriff of the parish of Ouachita, under a warrant issued by the Judge of the Fifth District Court which was based on an affidavit made before him by J. T. Howard and J. A. Mhoon, charging petitioners with being armed and having resisted an officer with force and threats, and thereby preventing with violence said officer, J. A. Mhoon, from executing the order and process of the judge of said court; that said affidavit was false and malicious. That they were compelled thereby to leave their homes and attend court, at Monroe, a distance of twenty miles from their homes, on the 2d of September, for the purpose of standing a preliminary trial under said charge and arrest; that on said day the parties who had instigated and instituted the said prosecution failed to be present, and petitioners were compelled to give bond for their appearance on the 9th September, when they again appeared and were tried before the judge sitting as a committing magistrate, and after full hearing and argument the judge discharged them, decreeing that there was an absolute want of cause to justify the arrest; that said affidavit was written and prepared entirely by F. P. Stubbs, attorney, agent and counsel for the defendant company; that in preparing said affidavit and actively instituting and urging said prosecution against petitioners, said F. P. Stubbs was representing said company and acting for their benefit and interest, and within the scope of his powers as their attorney and representative; that both Howard and Mhoon were employes of said company, and made said affidavit under the influence, direction and advice of said Stubbs for the benefit of said company, and as a part of said company's scheme and design to oppress, abuse and coerce petitioners; that said prosecution and arrest were malicious and without proper cause. That they had not made any threats against Mhoon, nor used any force and violence against him, and he and Howard and

Armstrong et al. vs. Railroad Company.

Stubbs were well aware that they had not violated or attempted to violate any law of the State of Louisiana, but to the contrary, without being armed, had peaceably and quietly requested said surveyor to desist from trespassing upon their premises. That said surveyor was in the employment and pay of the railroad company and engaged during the entire 26th of August, as aforesaid, in making a private survey of lands claimed by said railroad company and not included in the *ex parte* order of survey, as said prosecutor well knew.

That said arrest and prosecution were made and instituted not for the purpose of vindicating the law, but for the vindictive purpose of coercing petitioners and others to recognize the claims of the railroad to the land claimed by them, and to enforce the surrender of said lands to the agents of said roads.

That said railroad, its attorney and agents have been harassing and worrying the entire community in ward 9 to compel them to deliver possession of lands claimed by said railroad for which they have brought petitory actions, and recognize the defendants' rights to remain in possession until said actions are decided; that said attorney and said agents, in pursuance of their malevolent and lawless designs to coerce the people of said community, selected petitioners as victims and examples, in order to terrorize and intimidate petitioners and all their neighbors in the interest and for the benefit of said roads and its agents.

That they were damaged by said false and malicious prosecution in the sum of ten thousand dollars in loss of time and the expense of attending court and employing counsel to defend them, in damage to their crops during their absence, in vexation, worry and in physical and mental suffering caused by this illegal, unwarrantable and vindictive and malicious prosecution; that they are peaceable, hard working, law abiding citizens (farmers), with good characters for sobriety, honesty and fidelity to the duties of good citizens, which the railroad company and its agents well knew; that the false charge that they were law-breakers and criminals was slanderous and injurious to their good names and damaged your petitioners as above set forth.

Defendants denied each and every allegation of plaintiffs' petition and insisted upon strict legal proof. Further answering, it specially denied that it is legally liable for the acts of any agent outside of the

Armstrong et al. vs. Railroad Company.

scope and purposes of his employment. Further, it denied the truth of the allegation that the proceeding complained of was without cause and averred that the allegations that said proceedings were malicious are wilfully and maliciously false and were so known to be by the counsel who wrote them.

The jury returned a verdict in favor of the plaintiffs for twenty-five hundred dollars damages. Defendants "moved the court to set aside the verdict rendered because the same is contrary to the law as given by the court and to the facts of the case," alleging "that it was clearly established that the *defendant* not only *believed that there was probable cause*, but in fact there *was undoubtedly probable cause for the same*, whereas the clearest and latest authorities require that to sustain such an action the prosecution 'must have been instituted without any probable cause.' *Brelet vs. Mullen*, 44 An. 194."

The court overruled the motion and rendered judgment against the defendants in conformity to the verdict and they have appealed. Plaintiffs moved to dismiss the appeal for the reason assigned that this court is without jurisdiction *ratione materiæ*.

Gunby & Sholars, Newton & Madison and F. Vaughan Attorneys for Plaintiffs and Appellees:

Where several plaintiffs, having a common cause of action, unite in the same suit, each claiming an amount not exceeding two thousand dollars, but the aggregate of their claims being in excess of two thousand dollars, the Circuit and not the Supreme Court has jurisdiction of the appeals. 30 An. 609.

An action for malicious prosecution or for false imprisonment may be maintained against a corporation. 22 Am. and Eng. R. R. Cases, 366; 26 Am. and Eng. R. R. Cases, 121, 122; 99 Ind. 519; 22 Conn. 530; 1 Am. and Eng. R. R. Cases, 571; 4 Mo. 505.

A corporation is responsible for the acts of an agent performed while engaged in the discharge of duties within the general scope of his agency, although the particular act was wilful and was not directly authorized. 26 Am. and Eng. R. R. Cases, 122; 92 Ind. 371; 13 Am. and Eng. R. R. Cases, 1.

A corporation that entrusts a general duty to an agent is responsible to an injured person for damages flowing from the agent's

Armstrong et al. vs. Railroad Company.

wrongful act done in the course of his general authority, although the agent may have disobeyed instructions. 26 Am. and Eng. R. R. Cases; Story on Agency, 73; 46 N. Y. 23; 14 Am. and Eng. Ency. of Law, 40.

The principal is liable for the acts of his agent in the course of his employment and for the principal's benefit, even though he has given no special instructions to do them. 2 Greenleaf on Evidence, 449; Addison on Torts, 31, 32; Cooley on Torts, 536; 40 An. 91; 14 Am. and Eng. Ency. of Law, 25.

Masters and employers are answerable for the damages caused by their servants and overseers in the exercise of the functions in which they are employed. C. C. 2320; 40 An. 88.

A corporation is liable in damages for a malicious prosecution instituted by one of its officers or agents. 14 Am. and Eng. Ency. of Law, 40.

The discharge of the accused by committing magistrate is *prima facie* evidence of the want of probable cause, sufficient to throw on defendant the burden of proving the contrary. 34 An. 246; 36 An. 104; 24 An. 330; 2 Greenleaf on Evidence, 455.

Malice is inferred from want of probable cause. 4 An. 377; 6 An. 577; 9 An. 219; 15 An. 421; 33 An. 392; 42 An. 955; 41 An. 304.

The wanton and causeless injury of an individual is in itself a malicious act. 4 An. 377; 6 An. 578.

Public order and the highest interest of society require that no violence shall be done to one in peaceable possession of property. 44 An. 816, 818, 819.

Where criminal prosecutions are instituted not to vindicate the law but to coerce payment of debt or restitution of property, malice is conclusively presumed. 14 Am. and Eng. Ency. of Law, 48.

An officer charged with the execution of an order or process of court must give notice to party against whom directed, of its nature and purport and of his official capacity to execute it Wharton's Crim. Law, Vol. 1, pp. 549, 552.

Stubbs & Russell, Attorneys for Defendants and Appellants, cite: 8 R. 17; 12 An. 333; 15 An. 421; 27 An. 339; 33 An. 915; 40 An. 374; 44 An. 194; 2 Greenleaf, 449; 14 Am. and Eng. Ency. of Law, 17.

Probable cause is such a state of facts and circumstances as would create in the mind of a man of ordinary caution and prudence an honest and reasonable belief of the guilt of the party charged. It does not depend on the actual stage of the case, in point of fact, but upon the reasonable and honest belief of the prosecutor. 8 An. 12; 10 An. 537; 12 An. 333; 13 An. 274; 33 An. 915; 34 An. 1147; 36 An. 441; 38 An. 161; 40 An. 374, 1268; 44 An. 936; 2 Greenleaf, 458; 97 U. S. 645; 24 How. 551; 3 Wash. 37; 1 Me. 135; 2 Den. 617.

Acquittal or discharge not proof of want of probable cause. 3 R. 17; 8 R. 150; 34 An. 1268; 41 An. 511; 98 U. S. 195; 2 Greenleaf, 455.

Advice of counsel, under a full and fair statement of fact, followed in good faith, evidence of probable cause. 9 R. 421; 8 An. 12; 11 An. 290, 418; 15 An. 422; 2 Greenleaf, 459.

If defendant show probable cause, there must be judgment in his favor. 15 La. 298; 8 An. 12; 11 An. 418; 12 An. 333, 714; 23 An. 325; 29 An. 368.

The authority or a qualification of a *de facto* officer, or the sufficiency of a writ entrusted to him for execution, can not be denied by third parties. 10 An. 524; 28 An. 82; 39 An. 820; 36 Ala. 273; 79 Ala. 39; 82 Ga. 535; 17 Am. and Eng. Ency. of Law, 17.

Threats, with the ability and apparent intention to execute them, may well constitute resistance. 3 Wash. C. C. 335, 169; 43 Md. 490; 1 Dill. 17.

To fix liability on a corporation for unlawful acts of its employé, it must appear that the employer was expressly authorized to do the act, or that it was done in pursuance of a general authority in relation to the subject of it, or that the act was adopted or ratified by the corporation. Ang. and Ames Corp., Sec. 311; 51 Md. 290; 28 Atl. Rep. 615; C. R. R. vs. Brewer, 33 An. 58; 38 An. 631, 705.

Actions for malicious prosecutions are not encouraged by the law and must be cautiously entertained. From motives of public policy the prosecutor must be protected. 3 R. 20; 3 L. 278; 15 An. 605; 40 An. 374; 41 An. 511; 44 An. 194, 939.

Armstrong et al. vs. Railroad Company.

ON THE MOTION TO DISMISS.

The opinion of the court was delivered by

NICHOLLS, C. J. Appellees would place this case before us as if five different individuals having separate and distinct causes of action against a particular corporation had brought in the same petition five distinct demands against it, and had each obtained against it a separate and distinct judgment in his favor. It is argued that the demand of each of the plaintiffs against the defendants was really for two thousand dollars, and that by the judgment appealed from, the District Court adjudged to each of them the sum of five hundred dollars.

Are appellees justified in this contention?

We think not. The plaintiffs did not, for reasons of convenience and economy, and because the testimony taken in respect to any one of them would be to a great extent the same testimony as would be taken in respect to the others present themselves in the District Court urging separate demands and asking separate relief though advanced in the same petition. They did more than this—they appeared before the court as plaintiffs, all uniting in taking up certain acts complained of as having given rise to a *single cause of action*, in favor jointly of the five, and as entitling the five to a joint judgment of ten thousand dollars, and when a judgment was rendered in the case it properly followed the pleadings, and the prayer, as a judgment upon a cause of action declared upon as a single one, and in which the five plaintiffs were jointly interested.

This judgment, was it to go to execution, would have to be executed according to its terms, as a single joint judgment for twenty-five hundred dollars. The plaintiffs having control over their own pleadings, free to urge their rights as they themselves held and determined them to be, thought proper to proceed in the manner they have done. Whether they were right or wrong in so doing is not a question at present before us.

Having proceeded to judgment in the lower court as joint plaintiffs they can not in this court claim to have separate and distinct judgments and in separate and distinct causes of action, and to separate and divide the judgment into five parts of five hundred dollars each. Whatever appellate court would pass upon the judgment in the case would have to pass upon it as rendered—that is, as a single judgment

Armstrong et al. vs. Railroad Company.

for twenty-five hundred dollars. Appellant would be utterly without authority for the purposes of appeal to split the judgment up into five judgments for specific amounts, even if it thought it to be to its interest and desired to do so. It would have to deal with the judgment as it was made. Appellees claim that if this judgment was paid in full as rendered each of the five plaintiffs would be entitled to receive five hundred dollars and no more. We are not called on to say what each plaintiff would be entitled to receive from the judgment on a settlement *inter se*, if it was paid in full. The judgment itself determines that the five are to receive two thousand five hundred dollars, and not that each is to receive five hundred dollars, and it is with the judgment as such and prior to payment that we are dealing. We can say in this as was said in *Shields & Thomas*, 17 Howard, 3, that so far as the appellant is concerned the entire sum found due by the lower court is in dispute. It disputes the validity of that decree and denies its obligation to pay any part of the money. If the judgment should stand as rendered defendants will be made liable to pay the whole amount decreed to the plaintiffs. That is the controversy on its part, and the amount exceeding two thousand dollars we have jurisdiction in respect to it. *Heirs of Ballio vs. Prudhomme*, 8 N. S. 338; *Bowman vs. City of New Orleans*, 27 An. 501. Motion to dismiss refused.

ON THE MERITS.

In the year 1892 the District Judge for the District Court of Ouachita parish issued eleven orders in eleven petitory actions, which had been instituted by the Vicksburg, Shreveport & Pacific Railroad Company, in his court, directing the making of surveys of the property involved in that litigation and the making of due return to the court. The orders were granted *ex parte* upon the application of the plaintiff, in which it was alleged that since the filing of the suits it had had in its service competent surveyors running the lines of boundary of the lands in controversy in the causes, for the purpose of establishing the lines and ascertaining the occupancy *vel non* of said lands by the defendants; that while engaged in said work the defendants conspired together to intimidate and drive plaintiffs' employes away from the lands, and by threats and personal violence prevented the surveyor and his assistants from making the survey; that under the circumstances a survey of the land

Armstrong et al. vs. Railroad Company.

in controversy was necessary to locate the lines and ascertain the names of the occupants thereof; that there was no parish surveyor for Ouachita parish, and that it was necessary for the court to appoint some competent surveyor to make said survey and the parties should be notified.

Shortly after these orders were issued, James A. Mhoon, who had been designated therein as the surveyor to make the survey, undertook to execute the orders; but, after making a partial survey, he abandoned the work and returned to Monroe, where he had an interview with the District Judge. This interview resulted in an affidavit by Mhoon and one Howard, who had accompanied and assisted the former in his survey, the affidavit being taken before the judge himself. In this affidavit the affiants declared that, acting under the orders above mentioned, they had on the 25th and 26th of August, 1893, proceeded to survey and mark the lines of certain real property claimed and owned by the Vicksburg, Shreveport & Pacific Railroad Company, being in the odd sections in township 16 north, range 2 east, in ward 9 in said parish, and that on the 26th of said month A. A. Armstrong, J. V. Harvey, I. J. Brooks, M. Hunnicutt and A. J. Bush, being armed and aided and assisted, advised and abetted by a large number of other persons unknown to affiants, in pursuance of their expressed purpose did then and there by force and threats resist and oppose and prevent the said J. A. Mhoon under order of said court while surveying and attempting to survey, and execute the order of said court.

The affiants in the affidavit gave a list of the various orders under which they were acting. Upon the making of this affidavit the District Judge issued a warrant signed by himself, directing the sheriff of Ouachita to arrest the said trespassers and bring them before him for preliminary examination, and to keep them safely in his custody until discharged by law, the warrant reciting that due proof had been made before the said judge by the affidavit of John T. Howard and James A. Mhoon that on the 26th of August, 1893, the said parties did unlawfully resist by force and threats one James A. Mhoon, an officer of the Fifth Judicial District Court of said parish, in the execution of an order of survey in certain cases therein pending and to him directed by the presiding judge of said court, contrary to law in such cases made and provided.

It appears by the endorsement of the sheriff on his warrant "that

he received the same on the 28th of August, 1893, and proceeded to execute the same by arresting the parties named in said warrant, and released them on parole, they to appear before the judge of the Fifth Judicial District Court to undergo preliminary examination.

The parties named presented themselves shortly afterward at Monroe under their paroles for the purpose of a preliminary investigation, but in consequence of some misunderstanding as to the date of the same, the matter was postponed to a date fixed, the parties giving bond to appear at that time.

Upon the day so fixed a preliminary examination was had and evidence taken, and the District Judge being of the opinion that the testimony did not justify the holding of the parties they were discharged. Mhoon, the surveyor who had made the affidavit, was not present at this investigation, he being, it was said, at the time in another parish, confined to his room by sickness.

The District Attorney has since made no attempt to bring the matter before the grand jury, though it has been several times in session, and from his testimony it appears he has abandoned all idea of doing so in the future, stating that when a person has been discharged after a preliminary investigation he has found the effect to be so prejudicial to a subsequent prosecution before a jury, that he generally takes no further action in such cases.

The present litigation owes its origin to the facts just above stated. As a general rule, a petitory action and any incidental orders given therein would excite no special interest beyond the parties themselves. The eleven cases of which we have spoken are exceptions to this rule, for the reason that the title advanced by the plaintiffs would cover, if sustained, thousands of acres of other lands of which large portions are in the possession of others under circumstances more or less similar to, if not identical with those under which the defendants in these particular cases hold the same. The title set up by the plaintiffs is the same which was brought to our notice in the three cases of *V. S. & P. R. R. Co. vs. Sledge*, 41 An. 896; *Kemp vs. Monet*, 42 An. 1007; *State vs. R. R. Co.*, 44 An. 981.

The various steps taken by the railroad company in the direction of the assertion of pretensions antagonistic to those of so many persons being in the same immediate neighborhood, doubtless firm in their conviction that plaintiffs' claims are thoroughly unfounded, and sincere in the belief that their own are well grounded, have

Armstrong et al. vs. Railroad Company.

engendered, as shown by the evidence, feelings very unfriendly and hostile to the company and its agents, which have led up to active concerted extra-judicial opposition to those steps in the community in which those parties live. There is no necessity, for the purpose of this case, of our going any further back than what occurred on the occasion of Mhoon's own survey.

The arrival of the surveying party upon the ground was immediately followed by the assembling of a large number of people of the neighborhood.

Harper, one of the plaintiffs, says the object of the meeting was to see how the people could protect their rights and prevent the surveys. Bush, another of the plaintiffs, says: The people felt they had been imposed upon and they discussed together how they could protect themselves in the name of law, justice and order; and Harper, speaking of these discussions, said: "It was just the disposition of the people that the parties who represented them should go in a quiet and peaceful way or manner, without force or any manifestation of violence, tell Mr. Mhoon that it was the wish of the people that he should not make the survey."

Precisely what was said and done at the meeting is not shown by the testimony, but it is fair to assume that the course subsequently followed conformed to the conclusions reached. Among the different accounts of what occurred, that of Hunnicutt is the most detailed, and as it is not very long we transcribe a portion of it. "It was a Saturday, if I recollect correctly. There was a number of about twenty-five citizens went out in search of these parties making surveys, in order to request them to stop surveying the lands until they could show us and prove to us that they could give a guaranteed title with a United States seal on it, as we supposed they could not, and there was a committee of four appointed to go southeast across in the neighborhood of old man Jeff Hilton's, and also across Mr. Campbell's, and the committee consisted of Mr. George, Mr. Cox, Mr. Franton and Mr. Campbell—that was the committee appointed to go down there. We were to go out by Mr. Davis', or rather close to Mr. Davis', to wait for these people to come from below. We went there because it was a good deal nearer, as they had been surveying in there, and we did not know where they were. Mr. Armstrong was also with us, and as we drew near Mr. Davis' by some source, I can not say how, it was mentioned that they probably might be at Davis' or probably go there, as it was Saturday and

they would probably be going home. We decided after Mr. Armstrong went up to the house and inquired for his dogs, to wait for him until he got back. The road went to Davis'. We waited for Armstrong. While he was gone we decided we had better see what they had to say. When he came back he stated that Mr. Howard was there, and when he came back we had found them unexpectedly, and then appointed a committee consisting of Mr. Harper and Mr. Brooks to go and talk to them, and they did so. They went and stayed right smart while we wondered why they had gone and stayed so long; as it was gradually getting late along in the evening, I was sent up there to find out what they were doing. I went by myself this time. I went up there and found they were talking about matters generally, and I went back and told the people that they were not through talking yet. They got through and came back and reported that the surveyors had said that if it was the request of the people that they would not make surveys, but would go somewhere else and survey, was my understanding, and on this they appointed me and Mr. Bush to go and tell them that it was the wish of the people for them not to make any more surveys, until they could show the proper authority, that is until they could show us a deed with the United States seal on it, and we went up and delivered the message. We supposed that they agreed to go out if the people said so, and the people did agree that they wanted them to go. I never said anything to it that day. Mr. Bush said we agreed to it, and that the people wanted them to go out and stay out until they could show proper authority. They asked Mr. Brooks, whom we represented, and he said: 'I represent the people at large.' On their saying they would go, we turned back and went home, being very well satisfied with their agreeing not to molest us any more, as they had said they would go out. He further says that Mr. Bush said to them (the surveyors), 'We suppose you agree to go if the people say they wish it?' They said: 'Yes, we do.' He told them that we had reported and they sent us a committee back, and that they must go out and stay out. That this was said in a mild tone; there were no harsh words on either side—no threats and no violence used."

Armstrong, in his testimony, said that when, after ascertaining that Howard was at Davis' house, he joined the body of men that Hunnicutt refers to; he found them about a quarter of a mile from Davis', at a branch watering their horses. That there were fifteen

Armstrong et al. vs. Railroad Company.

of them, may be more; that they were all together in the road; that some were on their horses and some holding them; that he had a gun and no one else had.

Galloway, one of the witnesses, and a chainman for the surveyors, states that the main body of men was some two hundred yards from Davis'; that returning from work on Saturday at 12 o'clock, and going to Davis', he saw the men distinctly; that they were behind a hill; that some were standing, others sitting; that he saw several guns in the crowd, he would not say how many; that when he got to Davis' he found two were talking to Howard; that Mhoon had a conversation with Mr. Harper; Brooks still stayed there and talked. While they were talking a man came up the hill, and "hollowed" to come on and not to stay all day, and soon after these two men made off. A few minutes after, Mr. Bush and Mr. Hunnicutt rode up and told Mr. Mhoon. I suppose they were addressing him that the committee had reported, and that they did not recognize his authority and he must get out and stay out of there, and furthermore you must stay out. That the man who went up and "hollowed" to Mr. Harper and Mr. Brooks to come away and not stay all day had a double-barreled shotgun—he was quite sure of it.

Bush, speaking of the interview at Davis' house, said: "Mr. Mhoon called Mr. Hunnicutt and I off, and I told him that it was the wish of the people that he quit his survey and get out and stay out;" also that "Mr. Harper told him that he represented the people; that it was their wish for him not to run the survey; that we were there as a committee to tell him to get off, and stay off, and not run the lines." Bush, Brooks, Harper and Hunnicutt all testify that there were no threats made, nor force, nor violence used, and it is claimed by the plaintiffs that the interview between the committee and Mhoon was of a friendly character, not at all aggressive.

Mhoon himself did not take that view of the situation. His conduct and his testimony both showed that he considered it the part of prudence and discretion to at once abandon his work and return to Monroe, and this he did without delay, reporting to the judge, as has been stated.

Mhoon testified that Harper and Brooks called on him at Davis' house; that they told him they were a committee to wait on him; that he asked Mr. Harper to step to one side; that he told him that he had been appointed by the court to go there and do some survey-

ing, and that he wished to do it; that Harper said the people did not want the surveying done, and did not intend to have it done; that he, Mhoon, told Harper of his intention of going to Monroe that evening, and expected to return on Monday, and that he wanted to know if the people would let him finish the work. That at about that time some one down the road "hollowed" to him and asked him if he was going to stay there all night, and hollowed to him to come away; that Harper told him as he started to go off that he would let him know what conclusion they would come to—meaning the people—and left; that in a few minutes, may be five minutes, two others came up, who, he afterward learned, were Bush and Hunnicutt. That Bush came up and remarked that they did not recognize his authority, and that he would have to get out and stay out, and that he left, went up to Monroe and reported the circumstances. He testified further that "he asked Mr. Bush whom he represented, and that he answered that he represented the whole community;" that "he quit in obedience to what he considered a very peremptory order; that he did not see any armed body of men; that the only report he heard of it was from a colored boy. That he abandoned his work and did so because he was ordered to stop the work, and he was afraid to stay there—that he was afraid of all of them; that he had good reason to believe that there were plenty to enforce their order, and he did not propose to stay there and get into any trouble, and he came away; that he did not quit from choice."

Gallaway testified that after Bush and Hunnicutt left, "we (meaning Mhoon and others) consulted together and thought it best to take down the tent, pack up and go to Monroe, and we went on home." He also said: "I did not consider it would have been safe to have gone back. I told Mr. Mhoon at the time that I would not go back there."

Howard was of the same opinion as Gallaway. He testified that on his return to Monroe he reported to Mr. Lee (an agent of the defendants) that under the circumstances he would not go there any more; that he did not think it was safe to go back; that he thought it had got to the place (point) where either he or some one else would get badly hurt.

We may here say, before leaving the evidence in the case, that Harper admits in his testimony that Mhoon told him that he was acting under order of court.

Armstrong et al. vs. Railroad Company.

Under the state of facts disclosed by the testimony it is contended that the affidavit made against these plaintiffs, and the proceedings subsequently taken therein, were malicious, without probable cause, and greatly injurious and damaging to the plaintiffs. Their counsel urge upon us in support of their position the fact that upon the preliminary examination the District Judge, after evidence adduced, discharged the parties; they further call in question the order of survey and the action of Mhoon under it, claiming that it was *ex parte*; that the work was commenced prior to notice to the parties concerned; that the surveyor had not properly qualified himself by taking oath; that the surveyor had departed from the order of the court in its execution. The plaintiffs in this suit were not parties to the actions in which the orders were given, and are not in position to raise the question they attempt to raise. If there were any legal objections to the orders or the mode of their execution, even the parties themselves would not have been justified in taking the law into their own hands, but should have, through their counsel, used legal remedies which were fully open to them.

The plaintiffs were volunteers in the matter, acting either from sympathy with the defendants in their cases or from personal interests of their own in similar suits, which they anticipate would be brought against them. It is sought to have their action take the form of a mere friendly request to the surveyor to temporarily postpone action, and it is argued that though the parties were charged with armed force and resistance to the order of court, the evidence establishes that no threats were made nor violence and force applied, and therefore the charge made was groundless.

The offence which the warrant was intended to reach was obviously Sec. 785 of the Revised Statutes as amended by Act No. 11 of 1882, which declares that "Whoever shall illegally resist, oppose or assault any officer of this State while serving or attempting to serve or execute the process, writ or order of any court, or shall assault, beat or wound any other person duly authorized while serving or executing any process, writ or order aforesaid, shall, on conviction, be imprisoned not exceeding two years, at hard labor or otherwise or fined not exceeding one thousand dollars, or both, at the discretion of the court."

The warrant issued, as we have seen, upon an affidavit taken before the District Judge himself, who had issued the order of survey

to Mhoon, after a verbal report by him to the judge of the facts and occurrences connected with the attempted execution of the orders.

A comparison of the affidavit taken by Mhoon with the facts disclosed by the testimony shows it to have been substantially and practically true. There is no doubt that Mhoon, in the work he abandoned, was acting as a surveyor under orders of the District Court, and the conclusion reached by him, that by reason of that fact he was an officer of the court, was one adopted, recognized and acted on by the District Judge. There can be no doubt that the surveyor was, while attempting to execute the orders of the court, prevented from doing so by illegal resistance and opposition, and the only remaining question is, whether the statement made in the affidavit that the parties charged did, *by force and threats*, prevent the execution of the order, was justified and authorized to be made.

In the first place affiants are not to be held as rigidly bound by the exact terms used by them in an affidavit, as is the State by those in an indictment, particularly when the affidavit is taken before and scrutinized before being made by a District Judge learned in the law. In the next place the particular words "force" and "threats" as used and employed in affidavits and indictments, have not precisely the same scope as when used in ordinary conversation. The words "force and arms" are frequently used when they really add nothing to an indictment. It is a mistake, however, to suppose that in order to constitute force it is always necessary that actual active physical force be applied, or that to constitute "threats" violent language be employed. Any conduct, in the connection we are now dealing with the word, which would place the officer executing the process of the court in bodily fear or terror is "that force" contemplated by the law, while "threats" may be communicated by signs or by actions as fully and thoroughly as by word of mouth.

We do not question the testimony of the plaintiffs which declares that no violence was used and no threats were made, when we refer that language to actual force or spoken threats. We think, on the contrary, that the very object of the meeting preceding the interview with Mhoon, was to formulate a plan by which threats could be made to be implied and force to be foreshadowed, without bringing the parties resorting to the methods within the range of the criminal statutes of the State. No one reading the testimony in this record can fail to see that the parties who called upon Mhoon did so with

Armstrong et al. vs. Railroad Company.

the determination through their actions, and doubtless by the tones of voice of their committeemen sent to him, to impress him, as in fact they did impress him and his party, that they would be in great danger of bodily harm by further prosecution of their work.

It is not customary to make requests in the language used on the occasion of the interview through committeemen, with a body of men near by within supporting distance. It will not do to say for the purposes of this suit, that the display of men (to a certain extent masked) was a mere sham demonstration, and the appearance of one single armed person on the hill an insignificant circumstance. One single armed man would convey to the surveyors, as it was probably intended to convey, the impression that others were also armed, and could as effectually bring about a cessation of the work as the actual fact of the whole party being armed. The surveying party acted on belief and on appearances, and the facts were such as to reasonably bring about the belief.

We are of the opinion that the course taken by these five plaintiffs brought them within the reach of legal punishment. The District Judge thought them at first blush amenable to the statute cited, instead of *liable* to arrest and punishment for a contempt of his court. We are not called on here to say whether or not, under an indictment under Sec. 785 of the Revised Statutes, they could have been legally convicted; that is not the question before us. Mhoon and Howard made known the facts, and under a justifiable affidavit the District Judge himself designated the charge. If there was any mistake in affixing to plaintiffs' conduct its legal character, they were not to blame for it, or for a change of opinion by him later on. The conclusions we have reached do away with the necessity of our determining whether or not the defendants would have been legally responsible in the premises had there been really a malicious prosecution of plaintiffs, but it may not be amiss to say that defendants, by its pleadings, would have settled that question for this case. Not content with pleading the general issue they have adopted the action of Mhoon and justified under it, and in their application for a new trial they pressed upon the court that the testimony conclusively showed that they had good grounds for believing the plaintiffs criminal as charged in the affidavit.

The plaintiffs, on the other hand, by their pleadings, admit their participation in the acts complained of in the affidavit, but claimed

 LeBleu et al. vs. Timber Company et al.

that their acts were not of the character sworn to. The evidence does away with this claim, and, outside of the pleadings, we are satisfied that plaintiffs' conduct was such as to protect the parties who took the affidavit, or the defendant corporation from the present action.

For the reasons herein assigned it is ordered, adjudged and decreed that the verdict of the jury be set aside, and the judgment thereon rendered be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the defendants, against the plaintiffs, rejecting their demand with costs in both courts.

Rehearing refused.

 No. 11,644.

ZEPHERIN LE BLEU ET AL. VS. NORTH AMERICAN LAND AND TIMBER
COMPANY ET AL.

1. Where the husband after the death of his wife disposes in entirety of a particular piece of community property each of the heirs of the wife has a right of separate action for the recovery of the undivided portion of the property belonging to him and which has been alienated. There is no obligation to make the other heirs parties.
2. Vendees of community property sold by a husband after the death of his wife without authority can not drive the heirs of the wife to an action against their father upon the minors' mortgage. The property remaining in kind, they have the right to recover it in a petitory action. The recourse which minors have against their tutor's property was granted in their interest, and not as an instrumentality by which their rights could be overridden. Neither tutors nor administrators are permitted as a right to charge themselves with the value of the property belonging to the minors or to successions, and thus shift ownership from the minors and the succession over to themselves.
3. Where in the settlement made by a tutor with his children a particular piece of community property in which they have a right of ownership was accidentally, erroneously or intentionally omitted, no allusion is made to the same, the rights of ownership of the children in this property is not divested or affected by a receipt given by them as in full for the amount conveying to them as shown by the homologated account filed by their tutor, in which receipt it is consented that the evidence of the minors' mortgage on the tutor's property be erased. The account and the judgment of homologation extended only to the property and moneys therein covered.
The mortgage did not cover rights of ownership in property remaining in kind at the end of the tutorship, of which ownership the minors had not been legally divested.
4. A document signed by the Registrar of the State Land Office certified to by him to be a correct copy of the record of a patent which issued from that office, is admissible in evidence to show the date of the sale of the land by the State.

46	1465
49	175
<hr/>	
46	1465
110	86
<hr/>	
46	1465
113	1009
114	203
114	211
114	214
<hr/>	
46	1465
123	155

LeBleu et al. vs. Timber Company et al.

5. An exception to the rule requiring proof by the subscribing witnesses to an act *sous seing privé* is admitted where the instrument is not directly in issue, but comes incidentally in question in course of the trial, in which case the execution may be proved by any competent testimony without calling the subscribing witnesses.
6. Where defendant in a petitory action who has been in the exclusive possession of certain property reconvenes directly against a plaintiff, who seeks simply to be recognized as a joint owner with him in the property for the price of the improvements, which he claims to have been placed on the property whilst having such possession, he is correctly remitted for the ascertainment of his rights to an action of partition between the joint owners.

A PPEAL from the Twelfth District Court, Parish of Calcasieu.
Fournet, J.

Marie Victoria Verret, wife of Alphonse Amédé Corbelle, to whom he was married in the parish of Calcasieu in 1867, died on the 4th October, 1883, leaving as her heirs nine minor children, issue of this marriage.

Two of these children, one a son the other a daughter, died after their mother without descendants and intestate.

The succession of the wife was only opened in 1888, at which time the father was appointed and qualified as natural tutor of his children after an inventory had been taken of the property of the community between Corbelle and his wife. This inventory showed assets real and personal to the amount of one thousand and five dollars.

Upon the application of the father the minors' interest in this property was adjudicated to him at the price of estimation, and upon his petition he was permitted, upon the recommendation of a family meeting, duly homologated, to secure the interest of his wards by giving a special mortgage upon the N. $\frac{1}{2}$ of the S. W. 1-4 of Sec. 25, T. 9 S., R. 8 W., and east part of lot 4 of same section, containing twenty acres, said two tracts of land containing in all one hundred acres, with the buildings and improvements thereon, in lieu of the general mortgage resting on his property to secure the faithful administration of his duty as tutor.

In his petition praying to be allowed to give this special mortgage, he declared that the succession owed no debts.

The tutor filed an account of his tutorship, in which he set down as the assets of the community the price of the same property which figured in the inventory.

LeBleu et al. vs. Timber Company et al.

This amount he divided by two, placing one-half, or *five hundred and two dollars and fifty cents*, as the wife's share in this community property. He then charged the minors with twenty-two dollars and fifty cents as their share of cost of inventory and other items of law charges, and declared four hundred and eighty dollars to be the net amount of the wife's succession. Stating that the heirs of the wife were nine in number—eight minors, and one minor (Marie Alvina) emancipated by marriage to Zepherin LeBleu, he fixed the share of each heir at fifty-three dollars and thirty-three cents.

This account was homologated contradictorily with the undertutor of the minors, and Mrs. Marie Alvina LeBleu, the married heir.

The latter gave a receipt thereafter to her tutor in full of her share in the succession of her mother, as set forth in the account filed. Declaring therein that her right of mortgage on the property of her father as natural tutor was entirely satisfied, she authorized him to use the receipt as authority for demanding the cancellation and erasure of any mortgage which might be on record, springing from her rights of inheritance from her mother (fixed in said tutor's account at fifty-three dollars and thirty-three cents).

The four plaintiffs in the present suit, three of whom claim as heirs of their mother, Marie Victoria Corbelle, and of their deceased brother and sister, and the fourth as the vendee of Ophelia Corbelle (one of the nine children aforementioned, issue of the marriage of Amédé Corbelle and wife) of a one-seventh interest in the property which forms the subject of the present litigation, claim that during the existence of the community of acquets and gains, between Amédé Corbelle and his wife, Corbelle purchased from the State of Louisiana (obtaining a patent for the same at the time) the north half of section six, township ten south, range seven west, Louisiana meridian. That this property fell into the community. That after the death of his wife, and before the succession was opened in court, Amédé Corbelle, ignoring entirely any interest of the heirs of Mrs. Corbelle in that property, sold the same by three private acts to the defendant company, and that it has now and has always had possession thereof illegally and in bad faith; and that it is accountable for rent therefor; that the action of their father in disposing of the property in its entirety was without right or authority, and that the rights of the heirs of his wife therein have not been divested. They aver that their father is an absentee living in the State of Texas.

LeBleu et al. vs. Timber Company et al.

The prayer is that judgment be decreed in favor of petitioners, annulling said sales in part, and decreeing petitioners to be the owners of seventeen sixty-thirds of said lands, and for further judgment for seventeen sixty-thirds of four hundred dollars, improvements destroyed or removed from the land, and judgment against said defendant company for seventeen *sixty-thirds* of fifty-four hundred dollars rent for the use and benefit of said land during nine years from 1885, also for seventeen sixty-thirds of six hundred dollars per year for rent from judicial demand.

The defendant company excepted that, as shown by the petition, all the parties having an interest in the subject matter, and result of this suit had not been made parties to it. The exception was overruled and defendant then filed an answer containing in itself several exceptions which it declares it pleaded in bar of the action. These were: (1) That Amédé Corbelle, executed August 25, 1888, by notarial act of record, in the office of the clerk of court, *ex officio* recorder, etc., in the book of mortgages, the special mortgage referred to in plaintiff's petitions, for the purpose of securing the payment of any rights or claims plaintiffs may have had or might have against said succession, and the said special mortgage being still in force, and none of the plaintiffs having ever sought to foreclose said special mortgage, the plaintiffs herein have no right of action against respondent.

2. In bar of the demand of Marie Corbelle, wife of Zepherin LeBleu, it is pleaded that on or about August 21, 1888, she was paid by Amédé Corbelle fifty-three dollars and thirty-three cents, in full of her alleged share in said succession, and, being thereby authorized by her husband, receipted therefor in full as aforesaid, and, therefore, she and her husband are estopped from asserting or prosecuting their demand herein, and have no right of action against respondent.

The company in separate answer pleaded first the general issue. Further it denied specially, that the property ever belonged to the community named in plaintiff's petition, or that its own agent knew that it was claimed to belong to said alleged community, and averred that it bought the property in good faith by titles fully warranted in form, and translatable of said property, and of the defect thereof, if any existed, or continued to exist, it and its trustees and agent and general manager, Watkins, were ignorant. That when it purchased

said property it was of very little value, being very low, wet and swampy lands, but that since its purchase the company had, at great labor and expense, and in absolute good faith, placed improvements thereon to the value, at the institution of the present suit, and at the date of the answer, of not less than twenty-five thousand eight hundred and sixty-nine dollars and seventy cents, the items as to which it specially set up. That it had in good faith paid the taxes on it from 1886 to 1893, and would have to pay the taxes of 1894 thereon when they become due, which taxes as to amounts and dates it specially set out.

The company averred that it purchased the property from Amédé Corbelle with full warranty of title, and that it was entitled to call its said vendor in warranty to defend respondent's titles to said property in controversy, and to defend it in this suit.

The District Court rendered judgment in favor of the plaintiffs, and against the North American Land and Timber Company, setting aside partially as prayed for by the plaintiffs the three sales made by Amédé Corbelle to the company referred to in plaintiff's pleadings, and recognizing and decreeing each of the plaintiffs to own an undivided ninth of one undivided half, and of one-seventh of three-fourths of two-ninths of one-half of the property in litigation herein, making each of the plaintiffs undivided owner of seventeen two hundred and fifty-two parts of the property in litigation herein, the court recognizing and decreeing the property to have belonged to the community between Amédé Corbelle and wife. The court further decreed that all claims on the part of the plaintiffs in this suit for rent, revenues and values of improvements originally on said land, and all reconventional demands on the part of defendant—the North American Land and Timber Company—for improvements, fruit trees and other ameliorations to said property are rejected as of non-suit, reserving to the respective parties the right to present said demands in suit for partition, or other proper proceedings. It further rendered judgment in favor of the North American Land and Timber Company against each of the plaintiff's proportionally for repayment to it of the taxes which it had paid on the property from 1885 to 1894. It further decreed and ordered that the demand in warranty by the North American Land and Timber Company be rejected.

William F. Schwing for Plaintiffs, Appellees.

LeBleu et al. vs. Timber Company et al.

Thomas T. Taylor and George H. and E. L. Wells for Defendants and Appellants.

The opinion of the court was delivered by

NICHOLLS, C. J. The first question before us is the action of the court in overruling defendant's objection to the want of proper parties. If the allegations of plaintiffs be true, that the property in question belonged to the community, which was free from debt, and that after the death of the wife the father sold the entire property as his own by private acts, absolutely ignoring any interest therein of his children, each one of these children had the right separately and apart from the others to bring an action for the recovery of the undivided portion of the property belonging to him which had been attempted illegally to be conveyed. These parties might have all joined in one action, but they were under no legal obligation so to do. The act of the father was absolutely null and needed no setting aside. The judicial proceedings in reference to granting a special mortgage on the father's property had no bearing upon the question of the ownership of this particular property, as we will hereafter show. The exception was correctly overruled.

The position next contended for in this court by the defendant is that Ophelia Corbelle (Mrs. John Guillory) having consented to the homologation of the account of tutorship rendered by her father, and received from him the amount going to her as shown thereby giving him the receipt she did, is estopped, as is her vendee, from bringing the present action. The property in question was not placed in the inventory nor in any manner dealt with in the account. The father acted with respect to it as his separate property *dehors* the succession and the community. If Mrs. Guillory had an absolute vested right of ownership in the property at her mother's death, that interest was not divested by the fact that in the enumeration of the assets of the community this particular asset was accidentally and erroneously or intentionally left out. The account and its homologation extended only to the property and moneys therein covered. The receipt itself shows on its face that it had reference to those and nothing more. The acknowledgment of Mrs. Guillory that all her rights under the special mortgage had been satisfied and extinguished, and her consent that the inscription of the mortgage

in the records so far as she was concerned should be erased, could have been executed and the mortgage erased and extinguished without in the slightest degree, as matters stand, affecting his rights in the property. The evident theory of the defence is that because a mortgage has been given by a tutor to secure the fidelity of his trust to those in whose favor it is given, the minors are necessarily driven to an action upon the mortgage to secure their rights in respect to property of theirs with which he has illegally dealt while tutor. That although property belonging to the minors which has been illegally and unwarrantably sold by him for his own benefit still exists in kind, the parties holding the property so illegally disposed of can successfully resist the bringing of a petitory action by the owners for the recovery thereof. This contention is totally inadmissible. The law prohibits the sale of the immovable property belonging to minors unless for special reasons and under special conditions and formalities. Civil Code, Art. 339. It contemplates that generally the tutor should preserve that property in kind, and turn it over to the minor when he shall have arrived at his majority.

Neither tutors nor administrators are permitted as a right to charge themselves with the value of property belonging to minors or to successions, and by so doing shift the ownership of the same from the minors and the succession to themselves. To permit them to do so would be to recognize as a legal proposition that a party has the right to violate his legal obligations and legal duty to others, and leave them no redress save practically an action in damages.

In *New Orleans vs. the Wardens of the Church of St. Louis*, 11 An. 245, this court said, speaking of a somewhat similar pretension: "This is a doctrine as unsound as it is novel. The violation of a contract may be, and very often is, the ground of an action sounding in damages against the party who has violated the contract, but the claim in such a case is for the reparation of a wrong, and is the very opposite of a recognition of a right to violate the contract." The recourse which minors have upon the property of their tutors, through the legal mortgage which the law has created in their favor, is a remedy in their favor to be enforced by them for the protection of their rights, and not an instrumentality by which those rights could be overridden and broken down by the tutor.

So far from minors being forced (by reason of the illegal sale of their property by their tutor) to a personal action against him and

LeBleu et al. vs. Timber Company et al.

to an action of mortgage on his property, when the property alienated still exists in kind, it would often, on the contrary, be properly their duty, in the interest of third parties as well as their own, to proceed to the recovery of the property disposed of. In the case at bar the tutor did not go even so far as to charge himself with the value of the land. He sold it without authority, and seems to have repudiated the idea of all liability in the premises. The special mortgage given by the father, under the circumstances of this case, has no bearing upon the issues involved therein. The right of ownership of the plaintiff in the land in litigation is separate and distinct from any indebtedness or liability by the tutor to his minor children. The exception based on a contrary idea was correctly overruled.

ON THE MERITS.

The right of the plaintiffs to recover the joint interest claimed by them in the land described in their petition is unquestionable if they have supported their allegations by proof properly admitted by the court. Defendant denies that such proof has been made.

We think the certified copy of the patent issued by the State to Amédé Corbelle was properly admitted for the purpose of showing the date of the acquisition of the property by him. This, the plaintiffs inform us, was the purpose of the document. Defendant admits having purchased the property in question from Amédé Corbelle, and having it still in its possession. By the testimony of its own witness and former manager it has shown that the land was held by their vendor, under a patent which was exhibited to the manager at the time of the first sale, and placed in his possession when the third sale was closed. Both parties claim under the title acquired by Amédé Corbelle. The plaintiffs do not deny that Corbelle purchased this property in its entirety, nor do they deny that he could have legally sold in its entirety had not circumstances arising subsequently to its acquisition intervened and changed the legal situation. They simply maintain that after the title had been vested in Corbelle, the title and ownership of the property had become, so to speak, split into two by the death of his wife—one undivided half remaining in the father, the other vesting in the heirs of the wife, and that of their portion of this half they have not been divested. It is immaterial to both parties whether Corbelle bought from the State or from any other person. There is nothing set up by either plaintiffs or defend-

ant seeking to give to a title acquired from the State a character special or different from one from any other source. All parties rely upon the fact and validity of the title itself.

The issue is not as to the title conveyed to Corbelle, but as to the certain collateral facts which bear upon that title—first the date of the purchase, and next the date of the wife's death, and *the illegal divestiture of the plaintiffs' rights*.

The third section of Act No. 75 of 1880 makes it "the duty of the Registrar of the Land Office to keep account of the sales of lands which have been donated to the State, in well-bound books, with the number of the certificate issued therefor, setting forth the section, parts of section, township and range, district and parish, to whom and when sold, and for what price * * * which books shall be preserved as official records."

The law does not fix the form of the entries or of the record here required to be made, but simply declares the facts which must be placed of record. If the registrar places of record the entire patents which have issued, the record is just as legal as if mere *memoranda* or short notes had been taken and preserved of the *data* which the law requires to have perpetuated. The record being official, the registrar was authorized to give a certified copy from it, which was legally admissible for the purpose it was introduced.

The objections raised by appellant to the testimony offered to prove up the act of sale *sous seing privé* from Mrs. Guillory to Zepherin LeBleu were correctly overruled. Mrs. Guillory is not a party to this suit, and the defendant does not hold under her. Plaintiffs do not sue either the defendant or Mrs. Guillory *upon* the instrument—*quoad* defendant the present ownership of the interest which was inherited by Mrs. Guillory is only incidentally raised, and the parol testimony of a person who saw the parties and the attesting witnesses sign their names was properly received. Greenleaf, Vol. 1, par. 573b.

Defendant, after objecting to this testimony, went very far itself on cross-examination in the direction of proving up the fact which the document evidenced and the document itself.

Defendant claims that this paper does not purport to on its face convey any portion of the interest which Mrs. Guillory inherited from her deceased brother and sister. There was no necessity for her to state in the act the source or origin of her title; it was sufficient

LeBleu et al. vs. Timber Company et al.

that she owned an interest in the property to the extent conveyed. How she owned it would be a matter of evidence should occasion require proof on that subject. That proof has been made in this case. The remarks just made apply equally to plaintiff's pleadings as to this interest. There was no necessity for plaintiff to set out how the interest conveyed to Zepherin LeBlue by Mrs. Guillory arose any more specifically than was done in the petition.

Defendant, in its objections to the admissibility of the certified copy mentioned of the patent, urged that the copy was inadmissible until the identity of the Amédé Corbelle therein named with the Amédé Corbelle under whom plaintiff's claim was established. The objection went to the effect of the instrument, not to its admissibility. On the question itself of identity we have not the slightest doubt. The presumption arising from identity of name is fortified by all the facts in the case.

Defendant reserved a bill to the ruling of the District Court refusing to admit the testimony offered by it to prove the value of the improvements which it alleges it placed on the property while in exclusive possession of the same and remitting the consideration of that question to future actions.

The effect of the judgment rendered by us is to recognize the defendant as a joint owner of the property with the plaintiffs. The defendant occupying that position sues the plaintiffs in reconvention directly for the improvements. The District Court held correctly that whatever claim defendant may have against plaintiffs as arising from the improvements should be urged in another form of action.

Defendant complains of the judgment as between itself and its warrantor to the extent that it did not in terms reserve it a right of direct personal action in warranty against the latter. We think that this reservation resulted as the necessary consequence of the pleadings and the rulings of the court in respect to the warrantor. The District Court (rightly or wrongly) upon the exception of the curator *ad hoc* dismissed as issues in the case and from the consideration of the court all moneyed demands against the warrantor on the ground that he was an absentee and could be brought into court only for the adjudication of the question of title. He was held in court exclusively for that purpose, and therefore all personal claims between defendant and the warrantor remained open for future action. There can be no objection, however, to making

Mays vs. Witkowski.

the judgment so declare in express terms. We are of opinion that the judgment appealed from was sustained by the law and the evidence.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed with costs in both courts—the right of the defendant, the North American Land and Timber Company, to proceed by direct action in warranty against its vendor, Amédé Corbelle, being hereby expressly reserved.

No. 11,570.

DOUGLAS H. MAYS vs. L. L. WITKOWSKI.

1. In a petitory action, where plaintiff alleges the absolute nullity of certain tax sales under which it is assumed defendant will attempt to set up title, it is not necessary to make all the parties to those sales parties to the action. *Belard & Johnson vs. Gebelin*, 46 An. 326; *Heirs of Ford vs. Mills & Phillips*, 46 An. 331; *Dauterive vs. Opera House Association*, 46 An. 1317.
2. A tax sale made under the provisions of Act No. 47 of 1873 not preceded by the seizure of the property then required through the recording of a description of the property with the amount of taxes due in the mortgage books of the parish where the land is situated is fatally defective. The prior seizure was by the law a condition precedent to a right or authority in the tax collector to sell.
3. Though a defendant without title be authorized in a petitory action to set up an outstanding title in a third person against plaintiff's demand, such title must be a valid legal subsisting one. He can not eke out the defective title of a third person by invoking prescription in its favor. That plea belongs to the party acquiring by that title and those holding under him, not by a person not in privity with him.
4. A joint heir or joint proprietor can sue and maintain a petitory action against a mere possessor without title for the whole undivided succession or property.

A PPEAL from the Sixth District Court, Parish of West Carroll.
Ellis, J.

H. H. White and J. F. Ariail, Attorneys for Plaintiff and Appellant, cite *Boone on Real Property*, 5261; *Stafford vs. Twitchell*, 33 An. 523, 528; *Rougolot vs. Quick*, 34 An. 126; 14 An. 210; 30 An. 873, 1272; 37 An. 417; 45 An. 1109; 32 An. 236.

H. P. Wells and Potts & Hudson Attorneys for Defendants and Appellee:

46	1475
47	431
46	1475
52	203
52	391
52	1955
52	2028
52	2029
46	1475
120	31

Mays vs. Witkowski.

Until the heirs are placed in possession by an order or judgment of court, the property left by the deceased belongs to his succession. C. C., Arts. 872 and 873; 32 An. 1020.

The property is legally assessed to the "estate of John H. Martin" until the heirs of Martin are formally placed in possession by an order of court. 33 An. 816; 28 An. 180; 43 An. 873.

All deeds of sale made, or that may be made, by collectors of taxes, shall be received by courts in evidence as *prima facie* valid sales. Const. of 1879, Art. 210; Act 47 of 1873, Sec. 4; Act 107 of 1884; 38 An. 209; 35 An. 893, 1086; 31 An. 661; 30 An. 960; 29 An. 115; 37 An. 417; 40 An. 142.

Actions to annul tax sales are prescribed in three years. Act 105 of 1874, Sec. 5; 39 An. 406, 1008; 45 An. 485; 43 An. 726.

This prescription cures all nullities, absolute and relative. 39 An. 506, 1008; 43 An. 726.

All informalities connected with or growing out of any public sale shall be prescribed against in five years. C. C., Art. 3543.

This prescription applies to tax sales. 34 An. 208; 41 An. 816.

He who acquires an immovable in good faith and by a just title, prescribes for it in ten years. C. C. 3478.

Good faith is always presumed in matters of prescription and he who alleges bad faith in the possessor must prove it. C. C. 3481; 30 An. 937; 29 An. 43; 38 An. 212.

A tax title or other deed apparently valid, with no defects stamped on the face of it, is a sufficient basis for the prescription of ten years. 38 An. 212; 37 An. 417; 41 An. 816.

The purchaser in good faith from one who holds under a tax deed will be protected by the prescription of ten years. 43 An. 918.

The possessor may add to his own possession that of his author, to make up the ten years' prescription. C. C. 2493.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff claims to be the owner of certain lands in the parish of West Carroll described in his petition, which are declared to be "all the lands formerly belonging to the succession of John H. Martin of said parish." This suit is brought against L. L. Witkowski as being in possession of the same personally and through one Robert Holland as his lessee, the latter being made a

Mays vs. Witkowski.

party defendant. Ownership is claimed by plaintiff under an act of sale from Mrs. Lavilla B. Gillmore (wife of John Knox), a granddaughter of John H. Martin.

Coupled with the allegations in aid of plaintiff's pretensions are others, declaring null and void the title which it was anticipated would be set up by the defendants, and also null and void all the other various titles preceding his own upon which Witkowski would depend.

The titles so referred to were as follows:

Defendant Witkowski by deed January 13, 1892, from James H. Sample.

Sample by deed of 19th February, 1890, from Herman Wilczinski.

Wilczinski by deeds of February 15 and 17, 1887, from Simon Witkowski.

Simon Witkowski by deed of May 3, 1884, from W. W. Bradley, State Tax Collector, which deed was based upon a tax sale under an assessment made against Con. E. Campbell as owner.

Con. E. Campbell by deed of March 26, 1879, from Annie Baldwin.

Annie Baldwin by deed from R. K. Anderson, State Tax Collector, of date September, 15, 1873, which deed was based upon a tax sale, under an assessment made against the estate of John H. Martin.

Plaintiff assigns twelve different grounds as grounds of nullity of the tax purchase made by Simon Witkowski on the 3d of May, 1884, and thirteen grounds of nullity of the tax purchase made by Annie Baldwin on September 15, 1873.

Holland answered, denying that he was on the property sued for and praying to be dismissed. Witkowski's first appearance was through an exception to the action by reason of the want of proper parties; he urged that the suit was improperly brought, inasmuch as the plaintiff was seeking to annul several successive sales of the property sued for, without making any of the parties to the said sales parties to the action; that he was seeking to annul the tax sale made on the 15th of September, 1873, by Anderson, tax collector, to Annie Baldwin, upon the nullity of which the whole case rests, without making Annie Baldwin a party, or affording her any opportunity to defend said sale.

The exception having been overruled, the defendant answered, pleading:

Mays vs. Witkowski.

1. A general denial.

2. A special denial that Mrs. Lavilla Knox is the only surviving heir of John H. Martin.

3. That the succession of John H. Martin was duly opened in Carroll parish in the year 1862 by the death of said Martin, and that on the 12th June, 1862, his widow, Mrs. Mary E. Martin, duly qualified in Carroll parish as the executrix of the last will and testament, and therefore the property herein claimed was properly assessed to the estate of John H. Martin. That the property in dispute was legally and properly sold for taxes on the 15th day of September, 1873, when Annie Baldwin purchased the same in good faith for five hundred and eighteen dollars and thirteen cents cash, and after the legal delays for the redemption had expired said Baldwin applied for and obtained from the Auditor of State a confirmatory deed in accordance with Sec. 6 of Act No. 47 of 1873, dated June 4, 1874; that Simon Witkowski, on the 1st day of June, 1886, purchased the lands in dispute at tax sale; that said property was then sold as the property of C. E. Campbell, to whom said Baldwin had transferred same; that said property was sold for the taxes of 1885 and was bought in good faith by Simon Witkowski for the sum of ninety-one dollars and twenty-five cents in cash; that all of said transfers were made in good faith and for a valuable consideration, and that defendant and his author have held possession and paid taxes on said land to this date, and that it is legally and justly his property; that he pleads the prescription of three years against the action of the plaintiff to invalidate either of the above tax sales; also the prescription of five years against any and all informalities connected with or growing out of either of the above tax sales; also the prescription of ten years *acquirendi causa*; also the prescription of ten years against the right of Mrs. Knox or her vendee, Douglas H. Mays, to recover real estate derived by her by inheritance. That if evicted from the lands sued for, law, justice and equity require that plaintiff should pay respondent all the taxes paid upon said property by him and his author, amounting, in the aggregate to twenty-five hundred dollars. He prayed for the rejection of plaintiff's demand, but in the event of his eviction for judgment in reconvention against plaintiff for the sum of twenty-five hundred dollars.

The case having been submitted to the court after evidence adduced and argument heard, judgment was rendered sustaining de-

Mays vs. Witkowski.

defendant's pleas of prescription and rejecting and dismissing plaintiff's demand at his costs and he has appealed.

The court's action in overruling the exception filed was correct and is covered by the cases of *Belard & Johnson vs. Gebelin*, 46 An. 326; *Heirs of Ford vs. Mills & Phillips*, 46 An. 331; *Dauterive vs. Opera House Association*, 46 An. 1317. The plaintiff in his pleadings declared that all the transfers of property by which the title of John H. Martin and of his succession and heirs was sought to be divested were absolute nullities, not standing legally in the way of a direct petitory action requiring to be set aside. He had at his risk the right to go to trial on the issues made and tendered by him directly against the present defendant without the necessity of joining other persons.

ON THE MERITS.

An examination of defendant's pleadings shows that he does not, as plaintiff assumed he would, base title upon a tax sale in 1884, under an assessment made in the name of Con. E. Campbell, but upon a tax sale made in 1886, under an assessment made in that name. The record shows in 1884 the proceedings to which plaintiff alludes in his petition, but for some reason defendant has elected to ignore those proceedings, and to carry Campbell's supposed ownership down to 1886, at which time he claims Campbell's ownership was divested, and by Simon Witkowski acquiring the property at a tax sale.

The plaintiff asserts, and we think correctly, that there was no assessment of this property in 1885 as the property of Campbell. A description of the property was entered upon the assessor's books in 1885, and in that description it is declared to be the property of Campbell, but no assessment was made upon this entry; on the contrary, opposite the description is a statement that the entry was made through error, and reference is made to another page of the book, on which page the property is entered and assessed as the property of Simon Witkowski. *The title under which the defendant declared* being found to have no existence, he is left under the pleadings as a possessor without title of the property since 1886 (*Reynolds vs. Stille*, 15 An. 544). The prescription of ten years set up by him obviously has no application under his own possession and that of Sample, Wilczinski and Simon Witkowski, and not holding under and through Campbell,

Mays vs. Witkowaki.

he can not set up the latter's possession and that of his authors and tack it to his own.

The original ownership of this property by John H. Martin is not questioned. Plaintiff and defendant both claim under him. We have seen that defendant himself has no title; we have, therefore, to inquire whether the plaintiff's claim of ownership presented in a petitory action, be well founded or not. Defendant in possession contends that the ownership of Martin was divested by a tax sale in 1874, at which sale one Annie Baldwin acquired the property, and he pleads in aid of that title the prescription of three and five years.

Though a defendant without title be entitled in a petitory action to set up against the plaintiff's demand an outstanding title, the title so set up must be a valid, legal, subsisting title. A possessor without title can not eke out a defective title in a third person by invoking prescription in its favor. That plea belongs to the party acquiring by the particular title and those holding under him, and not by one not in privity with him.

The defendant has besides overlooked the fact that plaintiff is not seeking to invalidate a tax title. It is true that allusion is made by plaintiff to several tax sales, but this is not an action of nullity to set them aside; they are merely referred to as explanatory of the situation, and when referred to are stated to be absolute nullities. This action, as brought, is a petitory one, pure and simple. The tax proceedings and sales, so far as the plaintiff's pleadings are concerned, may be really thrown out of view and are considered only as set up in defence.

Was the Martin title divested by the tax sale of 1873, at which Annie Baldwin became a purchaser? Plaintiff directs our attention to thirteen reasons going to show that that title was an absolute nullity. As any of the thirteen reasons would be sufficient, if well founded, to justify this action, it will be unnecessary to consider them all.

The tax sale of 1873 was made, the tax collector's deed declares, under the provisions of *Act No. 47 of 1873*. The first section of that act declares that in case of refusal or neglect of any person against whom property is assessed to pay the taxes within ten days after the expiration of the public notice required by law, the tax collector may give ten days' written or printed notice to the owner or agent of the property assessed to pay said tax, after which delay, if not fully

Mays vs. Witkowski.

paid, the said tax collector may make a seizure of such property by recording a description of the same with the amount due in the mortgage book of the parish where it is situated, and on the fourth day of such recordation shall proceed to sell said property, without legal process, to pay said tax, and all lawful costs, after advertising three times within ten days in the official journal and in the country parishes where such publications can not be made by public notice for such ten days.

In the deed furnished by the tax collector to Baldwin the recitals are that after having made the necessary publications and advertisements, to-wit: in the *Lake Providence Republican*, a newspaper published in the parish of Carroll, said publications having been made on the 6th day of August, 1873, at the door of the court house in the parish of Carroll, on Levee street, between First and Second streets, town of Providence, parish of Carroll aforesaid, the following described property, to-wit: "N. 1-2 of S. W. 1-4 of Sec. 3; the S. 1-2 of N. W. 1-4, N. W. 1-4 of N. E. 1-4 of Sec. 10; E. 1-2 N. W. 1-4 of Sec. 22; all of Secs. 15 and 16; all of Secs. 11, 14, 23, 26 and 27, lying west of Bayou Macon, all in T. 22, R. 11 E., containing four thousand three hundred and thirty-nine and 14-100 acres, more or less, the same having been seized for the payment of taxes due by the estate of John H. Martin, as owner thereof according to the tableau and assessment rolls for the years 1867, 1869 and 1871, at which sale Annie Baldwin, residing at Circinnati, being the highest and last bidder, the said property was adjudicated to the said Annie Baldwin for the full price and sum of five hundred and eighty and 13-100 dollars, which I acknowledged to have been paid."

This deed was executed on the 15th September, 1873.

The act No. 47 of 1873 took as a starting point of official action against delinquent tax-payers a "public notice required by law." Within ten days from the giving of this notice tax collectors were directed to give notice to the owner or agent of the property to pay the tax; the notice to be given being authorized to be either written or printed. Ten days from the giving of this notice the tax collector was directed to make a "seizure" of the property, and this "SEIZURE" was operated under the law by recording a description of the property with the amount due in the mortgage book of the parish where the land was situated. This "seizure" or "recording" under the law became the "starting point" for official action looking to a sale, for it was

Mays vs. Witkowski.

only after four days had elapsed after this recording that the sheriff had authority to advertise. The statute fixed the time and manner of advertisement.

A comparison of the recitals of the sheriff's act with the requirements of this statute shows defects fatal to the deed. In the first place there is nothing to indicate that the original "public notice required by law" was ever made, nor that any notice, either written or printed, was ever given to the owner or agent, and in the next place there is nothing to show that any seizure of the property through the recording of its description with the amount of taxes due thereon was ever made. This "seizure," through recording, as the law then stood, was a sacramental formality. It was not only the initial point for the running of certain delays, but it was the very basis or warrant for subsequent action by the tax collector. It is claimed that the deed declares that the property had been "seized" for the payment of the taxes; but this conclusion of the collector that a seizure had been made did not take the place of a recital of the fact from which the seizure legally resulted. Again the tax collector, in reference to publications made by him, stated he had made the "necessary" publications, placing a second time his conclusions in the deed instead of the facts themselves on which conclusions could be reached by those authorized to reach them. The collector was not authorized to do so. The statement made by him of the advertisements made was an imperfect one, and by no means showed advertisements during the time and manner exacted by the statute.

We are of the opinion that the sheriff's deed was an absolute nullity and conveyed no title; certainly none which the defendant could invoke.

From the record it would appear that John H. Martin left *three heirs*, Mrs. Gillmore (of whom the plaintiff is the vendee) and two sons. One of these sons is shown to be still living and in this State, but nothing is shown as to the other. We must presume that he is still living. Under the circumstances what judgment should we render in the case? We are not authorized to adjudge the plaintiff to be the owner of more than an undivided one-third interest in the property, but what action shall be taken in regard to plaintiff's prayer for possession, which, as it stands, is for the possession of the whole property? Should we restrict the decree for the possession to the possession of an undivided one-third of the property, or

Sheriff vs. Bank of Morgan City.

should we decree as against the defendant, who has no title, that possession of the whole property be given to the plaintiff?

In *Compton vs. Matthews*, 3 La. 128, this court held "that a joint proprietor could sue and maintain a petitory action against a mere possessor, without title, for the whole undivided succession or property." The principle there enunciated has been several times re-affirmed and controls this case.

The defendant not holding under either Baldwin or Campbell, his claim of subrogation from them is without basis. The liability of the plaintiff for reimbursement of taxes which may have been paid on this property can not be tested in the present suit. Any claim which defendant may have against the plaintiff for reimbursement of taxes paid on the property should be reserved. *Font vs. McConnell*, 46 An. 215.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the plaintiff be recognized as, and declared the owner of one undivided third of the property claimed by him, and that he be placed in possession of the whole property as prayed for in his petition.

It is further ordered and decreed that defendant be reserved the right to claim from the plaintiff the repayment of taxes which have been paid on the property in litigation herein, for which the plaintiff is legally liable, and that the defendant pay the costs in both courts.

No. 11,656.

A. G. FRERE, SHERIFF, VS. THE BANK OF MORGAN CITY.

As this record presents a simple question of fact, and the amount involved is below the lower limit of this court's jurisdiction, the appeal must be dismissed.

A PPEAL from the Seventeenth District Court, Parish of St. Mary.
Allen, J.

J. Sully Martel for Plaintiff, Appellee.

Philip H. Mentz for Defendant, Appellant.

46	1483
109	749
109	756
46	1483
112	404

Sheriff vs. Bank of Morgan City.

The opinion of the court was delivered by

WATKINS, J. This is a proceeding on the part of the tax collector, by rule on the defendant, to show cause why it should not pay a license of one hundred and fifty dollars for pursuing the business of *private* banking in conformity to the provisions of Act 150 of 1890.

The answer of the defendant is that it is a duly organized corporation under the laws of the State, for the sole purpose of banking, and is not liable for the license demanded, nor any other license for carrying on the business of banking. That its capital is twenty-five thousand dollars, and that it has no surplus. That it is not a private bank, but a public bank. That there is no law requiring a license from a bank with that capital and no surplus; and that it was not the intention of the General Assembly of this State that such a bank should pay a license.

We extract from the brief of the defendant and appellant's counsel the following, viz.:

"This action is based on a rule to show cause, taken by the attorney to aid the collector of licenses, and directed against the defendant corporation as 'private bankers,' and the demand is for a license of one hundred and fifty dollars for carrying on such business.

"The defendant's answer is that it is not liable for the license asked for nor any other license; that its capital is twenty-five thousand dollars, and that it has no surplus; that it is not a private bank, but a public bank; that there is no law exacting such a license from such a bank with that capital and no surplus."

From the petition, answer and brief it is easily and plainly discoverable that the case presents only a question of *fact* for determination, and no question of the legality or constitutionality of the license that is sought to be recovered from the defendant.

As plainly stated in defendant's brief, his contention is that "it is not a *private* bank, but a *public* bank."

It is perfectly clear that this court has no jurisdiction of this cause—the amount in controversy being less than two thousand dollars in amount.

The appeal must be dismissed *ex proprio motu*.

It is therefore ordered and decreed that the appeal in this cause be dismissed at appellant's cost.

Newman vs. Cooper.

No. 11,573.

H. & C. NEWMAN VS. A. B. COOPER. THOMAS J. COOPER ET
ALS., INTERVENORS.

1. At the dissolution of the matrimonial community by the death of one of its members, the title to community assets is vested jointly in the survivor and the heirs of the deceased, subject to the payment of community debts; and, as a consequence of the dissolution, the survivor can exercise no further control over the half that has vested in the heirs of the deceased, and can not lawfully encumber it with a mortgage in favor of his individual creditor, whose debt was contracted since the dissolution.
2. The theory of our law is, that a community of acquets and gains has, after the death of one of its members, only a fictitious existence, for the purpose of liquidation and settlement of community debts; consequently, when the surviving husband is the debtor of his wife at the time of her death, her heirs become *eo instanti* creditors of the community; and such survivor can not mortgage his half of the community property to secure his individual debts, otherwise than subject to the liquidation and settlement of the community and the payment of its debts out of its proceeds by preference.
3. The community creditors whose claims are unsecured by mortgage are entitled to be paid from the assets of the community by preference over the individual creditors, though the latter are secured by special or judicial mortgage. Such mortgage of the share of the survivor is not null, but its enforceability is restricted to the *residuum* after community debts have been discharged. That the community must be liquidated and settlement effected in the course of proper judicial proceedings in order that the amount of such *residuum* be ascertained, and in such case the mortgagee of the husband will not be permitted to proceed in the foreclosure of his mortgage until this *residuum* has been ascertained.

A PPEAL from the Sixth District Court, Parish of Richland.
Ellis, J.

J. W. Willis for Plaintiffs, Appellees.

Gunby & Sholars for Defendants and Intervenors, Appellants.

The opinion of the court was delivered by

WATKINS, J. Suit is brought *via ordinaria* on the defendant's promissory note for five thousand dollars, secured by special mortgage, and plaintiffs' prayer is for personal judgment for that amount, with interest, and a decree of foreclosure against the property mortgaged.

In the petition the note is fully described, with all of the various

46 1485
48 427
48 745
48 1207
49 171
49 1007
46 1485
110 83
110 89

Newman vs. Cooper.

endorsements thereon, renewing and extending payment thereof from time to time.

In limine, the exception was tendered that the defendant, A. B. Cooper, was not, at date of suit, in possession of the premises mortgaged, having sold and delivered the same to the intervenors. But the act of mortgage is authentic in form, was duly recorded, and contains the pact *de non alienando*.

And the well settled jurisprudence of the State is that "a purchaser of property subject to a mortgage containing that clause, and duly recorded, can not claim to be in any better condition than his vendor, nor plead any exception the latter could not. Those who purchase or acquire real rights on it, subsequently, are presumed to know the titles or incumbrances under which they hold." 1 Hennen's Digest, p. 955, No. 1, and authorities cited.

The judge *a quo* correctly overruled the exception.

Substantially, defendant's answer is that the note sued on was executed, and the mortgage consented, to secure his current, running commercial accounts with the plaintiffs for advances of necessary plantation supplies made and to be made to him in the course of the year 1887-88. That in the course of said dealings he was charged large sums in the way of usurious interest and unlawful charges for commissions on cottons not shipped to nor sold by them. That by the subsequent execution of various other notes and making subsequent payments, any possible indebtedness that might have been evidenced by the note sued on was extinguished by novation, and consequently nothing is due thereon to plaintiffs; and he avers that these facts are disclosed on the face of the plaintiffs' accounts current, which were duly rendered to him. He concludes his answer with the prayer "that the note sued on be declared novated and extinguished, and utterly without consideration; and that the mortgage by which it was originally secured be declared discharged and abrogated by the extinguishment of the said note."

The children and heirs of Mrs. Martha A. Cooper, deceased wife of A. B. Cooper, intervene and allege that their mother died on the 9th of December, 1883, leaving them as her survivors, and a considerable amount of real and personal property.

That her surviving husband, their father, did not qualify as administrator of her succession, nor as tutor of the *then* minor children, issue of his marriage with their mother.

Newman vs. Cooper.

That he continued in possession of the *community property*, which consisted of a plantation, stock and implements, and controlled, cultivated and enjoyed same up to and including May 2, 1893, when he recognized "their ownership of one-half of said property and transferred his half thereof to (them) *in satisfaction and settlement of the amount due their mother by the community* between her and their father, on account of (her) paraphernal claims; all of which is set forth in the deed from A. B. Cooper to petitioners, dated May 2, 1893, and of record," etc. (Our italics.)

They aver further that, "at the time of their mother's death, her said husband owed her largely on account of money received by him from sale and rent of her separate property, and for moneys received by him from the estate of John Prewitt, the father of said Martha A. Cooper. *That said claims were due by the community, and that A. B. Cooper had no ownership or interest in the community property until he had settled the debts of the community.*

"*That petitioners being, by virtue of their heirship, creditors of the community, are entitled to be paid out of said A. B. Cooper's estate, and part of the community, in preference to debts contracted by him subsequent to the death of his wife.*

"That, if her succession had been (administered), he could not have created debts to bind said property, or any part thereof, until the succession had been settled and closed; and that he had no greater power or right to bind said property without administering said succession.

"That their claims against A. B. Cooper, as above set forth, amounted to four thousand six hundred dollars, in settlement and discharge of which he sold his interest in the above described plantation to (them)."

That the mortgage plaintiffs seek to enforce was previously executed on the 2d of April, 1887, and the object of their intervention is to resist and oppose the enforcement thereof on the following grounds, viz.:

"1. The mortgage of petitioner's half interest in said plantation, inherited from their mother by her surviving husband, was and is an absolute nullity, because said interest never belonged to A. B. Cooper, and could not be disposed of by him after the dissolution of the community.

"2. The mortgage as to the other half interest is null and void

Newman vs. Cooper.

because it was made on property belonging to the marital partnership, before said partnership was settled between the surviving spouse and the heirs of the deceased spouse—which settlement, when made, showed that A. B. Cooper owed his deceased wife more than the value of his interest in the community.

“3. That after the execution of the note sued on, the defendant delivered more than enough cotton to plaintiffs to have paid the same, by legal imputation of payments.

“4. That the note was novated by new notes, which plaintiffs still hold, and the mortgage extinguished thereby.”

Their prayer conforms to their allegations.

Plaintiffs amended their petition so as to demand the payment of counsel fees.

They also moved to strike from defendant's answer all the averments as to payment and novation, because endorsements on the note evidenced its extension; and further, because the defendant had executed various written waivers and acknowledgments. We are of opinion that the lower judge very properly declined this application, as these are matters appertaining to the merits of the cause.

They then excepted to the intervention on the ground that the maker and mortgagor can not impeach his own act, and that intervenors are bound by the acts of their father, and are estopped from attacking or impeaching the act of mortgage. Further, that plaintiffs accepted the mortgage on the faith of the defendant's recorded title, and the certificate of the clerk that there existed no prior mortgage upon it, without any notice whatever, either on the assessment rolls, or otherwise, that Mrs. M. A. Cooper, or the intervenors, claimed to have any title or privilege whatever to the recorded title of A. B. Cooper. That plaintiffs had no knowledge of the death of Mrs. M. A. Cooper at the time of the execution of said mortgage, and there being nothing of record to show that she had any legal or tacit mortgage, and there being no administration and no tutor appointed for her minor children, or legal mortgage recorded for them, they consequently believed and accepted said mortgage on the belief that A. B. Cooper was the *sole and only owner* of the property mortgaged. And they aver that they can not be affected by any pretended sale, or other proceedings between the mortgagor and intervenors, made with the intention of defrauding

them, and to which they were not parties, and of which they were ignorant. And for all the foregoing reasons the intervenors are estopped from disputing the validity of said note and mortgage.

These exceptions were taken up for trial and some evidence introduced, whereupon the court referred same to the merits *ex proprio motu*, and the plaintiff's counsel retained a bill of exceptions to its so doing.

Under the circumstances this was a proper ruling.

The judge required evidence on which to base a ruling on the exception, and such evidence trenched upon the merits.

The answer of plaintiffs to the petition of intervention is of like character as the foregoing exceptions, coupled with the additional allegation that not only was there no administration of the estate of intervenor's mother, but there was no property to administer and no claim on behalf of the deceased to the property mortgaged. That the defendant, "A. B. Cooper, had been in control and possession of said property from 1871 until the present time, according to the assessment rolls and the notarial books of the parish wherein same is situated. That the pretended sale referred to in intervenor's petition as of May 2, 1893, of said property mortgaged from their father to them is a fraudulent simulation, made with the intention of defrauding plaintiffs of their just rights of mortgage * * * as A. B. Cooper was, at the time, and is now insolvent, to the knowledge of the intervenor, and that they knew of no other property out of which they could make their debt. * * * That said sale was made totally without consideration, as defendant herein did not owe intervenors a cent; and if intervenors ever had any property (which is specially denied) it has been consumed or appropriated to their bills for board, tuition, doctor's bills and clothing since the date of their mother's death, which expenses of raising and educating said children (five in number) since 1883 fully amount to ten thousand dollars; most of which expenses were borne by plaintiffs since 1885, as will be shown by the accounts current of plaintiffs with A. B. Cooper, running from 1885 to the present date, of which money and goods shown by said accounts at least three thousand dollars were received by the intervenors; and though some of them may have been minors, said money and necessary supplies were used by them and inured to their special benefit in defraying the expenses of their

Newman vs. Cooper.

support and education, and they are bound to plaintiffs to the extent that they, said intervenors, have been benefited," etc.

That Mrs. M. A. Cooper never had any paraphernal property, or paraphernal claim, whatever, against her husband, and if she had, same was under the control and administration of her husband, A. B. Cooper, and the rents and revenues thereof belonged to the community before her death, and were appropriated to the payment of community debts, and not to the individual debts of A. B. Cooper.

These copious extracts from the pleadings evidence the earnestness and zeal with which this litigation has been prosecuted on either side, and bring out all the salient features of the respective controversies of the different parties.

Upon an examination of the pleadings and evidence the lower judge gave a judgment in favor of the plaintiffs for the amount of the note sued on, but restricted their mortgage to one undivided one-half interest in the property mortgaged to them by the defendant, and recognized the title of the intervenors to the other half interest free of the plaintiffs' mortgage.

From that judgment both the defendant and intervenors have appealed; and, in this court, plaintiffs and appellees have answered the appeal and prayed that the decree of the lower court be so amended as to award them judgment against the intervenors, *in solido* with defendant, in the sum of one thousand nine hundred and eighty dollars, and to recognize and enforce their mortgage against the *whole* of the property mortgaged.

From a consideration of the pleadings, in connection with the decree rendered, it is evident that the judge *a quo* regarded the plaintiffs' exceptions and pleas of estoppel, in respect to intervenors, not well taken—notwithstanding no mention is made of them—and thus felt satisfied of the *previous* existence of a legal or matrimonial community between the defendant, A. B. Cooper, and Martha A. Cooper, mother of the intervenors, which terminated at the death of the latter, and vested a title to the assets thereof in equal joint ownership in the survivor, the defendant, and the intervenors, in equal portions, as the legal heirs of the deceased.

But the judge *a quo* failed to express any opinion on the other questions in the case; though his decree results in the rejection of the contention of the defendant *in toto*, as well as those of the intervenors in all other respects.

It is, however, evident to our minds that, in so far as the decree of the lower court recognizes the title of the intervenors to one undivided half of the property, it is clearly correct and supported by the evidence; and, *quoad* their half interest, the plaintiffs' exceptions were altogether unavailing. For the law is that, at the death of one of the members of the community, the title to community assets vests in the survivor and the legal heirs of the deceased, in *full*, joint ownership—subject to a qualification that will be subsequently noticed. Applying that rule of property to the facts of this case, and it at once becomes evident that the half interest of the intervenors as the legal heirs of Mrs. Martha A. Cooper, deceased, did not pass under the plaintiffs' mortgage; and such is the legal aspect of the case, irrespective of the fact that nothing was exhibited on the face of the conveyance records or on the assessment rolls to the contrary; however potent the effect of same may have been as to the defendant. But in the aspect of the case in which it is at present considered, the title of the intervenors rests exclusively upon their inheritance from their mother, as the deceased member of the community, which had no relations with the plaintiffs, and whose debt against the defendant was not contracted until long subsequent to its dissolution. And the indebtedness of the defendant having been created *since* the dissolution of the community, it could not in any way affect the title which had vested in the intervenors, unless they had done some act which operated an inducement to the plaintiffs to alter their previous position and accept the defendant's mortgage.

Such, however, is neither the claim nor the tendency of the plaintiffs' averments, nor the proof.

But a more serious and interesting aspect of the case is addressed to our consideration in the averments of the intervenors, which are to the effect that at the time of their mother's death, in December, 1883, their father, the defendant, was largely indebted to her on account of moneys received and properties converted to his use and that of the community, all of which was that of their mother's separate paraphernal estate, and that said indebtedness was due by the community to them as the legal heirs of the deceased, they becoming, by virtue of their inheritance from their mother, the creditors of the community in her place and stead. And they are further to the effect that the defendant, A. B. Cooper, possessed, as the surviving

Newman vs. Cooper.

member of the community, "no ownership or interest in the community property until he had settled the debts of the community;" and that "they, as creditors of the community, are entitled to be paid out of said A. B. Cooper's estate, and part of the community, in preference to debts contracted by him subsequent to the death of his wife."

The intervenors take the initiative, and judicially admit that there was never an administration upon the estate of their deceased mother, and aver that no tutor was ever appointed or qualified—natural or dative—to represent them, they being minors at the time of their mother's death; and they further aver that had there been an administration of their mother's estate, their father would have been powerless to contract debts to bind her estate or the property of the *dissolved community*, or any part thereof, until the succession of the deceased, and the community had been finally wound up, and that he had no greater power or right to bind said property in the absence of an administration. They further aver that the mortgage which the defendant executed upon his one undivided one-half interest in the community property was and "is null and void because it was made on property of the marital (community) or partnership before (same) was settled between the surviving spouse and (themselves) as the heirs of the deceased spouse, which settlement, when made (disclosed) that A. B. Cooper owed his deceased wife more than the *value* of his interest in the community."

Two propositions are thus demonstrated, (1) that the intervenors recognized the *existence* of the plaintiffs' mortgage on the defendant's half interest in the property, as an asset of the community, *anterior* to the date of their alleged settlement with their father, the defendant, through the instrumentality of the *dation en paiement* to them of the property mortgaged; (2) that their mother's paraphernal claim of four thousand six hundred dollars against her husband, the defendant, was not recorded during her lifetime, nor after her death, prior to the date of the registry of the plaintiffs' special mortgage—thus eliminating the question of the rank of legal and conventional mortgages.

These two propositions being conceded, the question of law is squarely presented on the intervention and answer, as to the enforceability *vel non* of the plaintiffs' mortgage against the defendant's share in the community property, before community debts have

been liquidated and settled—said community debts being unsecured by mortgage of any kind.

This court has decided uniformly, and in varied forms of expression, (1) that at the dissolution of the matrimonial community by the death of either spouse the property acquired by the community vests in the surviving spouse and the heirs of the deceased in joint ownership; (2) that if the community have creditors they can have it liquidated, or pursue the survivor and heirs who have accepted it, “and subject the property to the satisfaction of their debts by divesting the title thus acquired;” (3) that if the community has no creditors, the title which the survivor and the heirs have acquired becomes absolute and indefeasible. *Vide* Dickson vs. Dickson, 36 An. 453, and authorities cited.

As interpreting the defeasibility of the title of the survivor of the community and the heirs of the deceased partner, the following terse expressions of opinion may be quoted, viz.:

“According to our understanding of the Code the distinct interest of the parties attaches at the dissolution of the marriage, subject, however, to the right of the wife or her heirs to renounce, and thereby exonerate themselves from the payment of community debts. His (the husband's) authority as master of the community ceases on the dissolution of the marriage. The right of the heirs of the deceased party then attaches to have a partition of the effects, *subject to the payment of debts.*” German vs. Gay, 9 La. 332. (Our italics).

“After the death of one of the spouses, the community, in a legal sense of the word, is terminated. Each party is seized of one undivided half of the property, subject to the payment of debts.” Hart vs. Foley, 1 R. 381.

The heirs of the deceased become seized of the property of their ancestor at the moment of his death. The surviving widow is seized of one-half of the community property, and the heirs of the other. *The title vested continues in them, subject to be divested at any time by the creditors, or the administrator for them.* (Our italics.) Ware vs. Jones, 19 An. 428.

The community of acquets and gains is dissolved by the death of the wife. The respective interests of the surviving husband and of the (heirs) of the deceased wife attach *at the moment of the dissolution* to the property of the community *subject to the payment of com-*

Newman vs. Cooper.

munity debts. *Tugwell vs. Tugwell*, 32 An. 848; *Bartoli vs. Hugeward*, 39 An. 411; *Heirs of Murphy vs. Jury & Gillis*, 39 An. 785.

As we said in a recent case that "the theory of our law is that a community of acquets and gains has, after the decease of one of its members, only a *fictional existence*, for the purpose of liquidation and settlement of community debts;" and that in the *absence* of community debts the respective interests of the survivor and heirs "attached to the community at once and irrevocably, and thereafter it continued to be property held in joint ownership," etc. *Succession of Dumestre*, 42 An. 411.

The foregoing decisions express a *consensus* of opinion by this court that is absolutely authoritative, to the effect that the title of the survivor, and the heirs of the deceased member of a *dissolved* matrimonial community, is vested in them fully only in case there are no community debts remaining unpaid; but, in case there remain community debts unsatisfied, the community possesses a *fictional existence*, after the death of one of its members, for the purpose of liquidation and settlement of such community debts; and this, notwithstanding the surviving husband's authority, as master of the community, ceases on the dissolution of the marriage.

This being the condition and *status* of the title of a surviving husband and partner of a community that has been dissolved by the death of his wife, it seems to be a clear proposition that the defendant, occupying the relation of debtor of his wife, and she at the same time being a creditor of the community, could not mortgage a greater interest or better title than he possessed in the real estate of the community.

We find in the opinion of this court in *Dickson vs. Dickson*, cited *supra*, the following statement, which is worthy of observation, to-wit:

"In either case—that is to say, whether there are debts of the community or not—the widow and heirs can mortgage their interests in such property, if it be real estate, and the creditor acquiring such property is entitled, in case of non-payment, to have it seized and sold to satisfy his claim, subject to be expropriated and out-ranked by creditors only of the community and of the deceased spouse, and whose mortgage was recorded anterior to his own, however, to be paid out of succession property."

It would seem to place a restriction upon the claims of community

creditors, as recognized in other decisions, by postponing the rights of one holding a *special* mortgage on the interest of the surviving member of a *dissolved* community, to the payment of *such community debts as may be secured by a mortgage duly recorded anterior thereto*, and no others.

In our opinion that is an improper restriction on the rights of community creditors, and its maintenance would enable the surviving member of a community to defeat the collection of community debts out of his share altogether by contracting debts after the death of the deceased member and securing same by mortgage on his share.

Surely such was not the intention of the law, and is not the sense of our jurisprudence on the subject.

In the case of *Dickson vs. Dickson*, 37 An. 915, this court expressed it as their appreciation of the sense of all the decisions on the subject, "that a widow in community can not, whilst the succession is under administration *and before its debts are paid*, execute a valid mortgage on any specific property of the succession to the *prejudice of creditors of the succession*," and then say: "Whilst therefore, a mortgage given by the widow in community during her administration of her deceased husband's succession is not null, yet at the same time it can have no effect beyond her actual interest in the property, determinable upon a settlement of the community.

"It is true that the widow's interest in the community vests upon the death of the husband, but subject to the payment of the community debts, and, therefore, not to be ascertained till a final settlement. It would thence follow that where a mortgage is given to a certain number of heirs to secure a liability which the administration is under alike to all the heirs, resulting from her acts as administratrix, *the giving of a mortgage could not confer a preference on the mortgagee over the other heirs*. * * *

"To this extent and limit the mortgage may seem to strip it of all effect and virtually pronounce it a nullity."

By parity of reasoning this argument would seem to apply, with equal force, to a special mortgage executed by the surviving husband on his share of the community prior to its liquidation and the settlement of community debts; and to give to a special mortgage consented by a surviving husband on his share in the community property *preference* over the debts of the community that are unsecured

Newman vs. Cooper.

would be to defeat the object of the law and make a defeasible title indefeasible.

In *St. Charles Street Railroad Company vs. Fairex* (46 An. 1022) we dealt with a similar question, appertaining to community property which had been partitioned between the widow and heirs, and against which a judicial mortgagee sought to enforce his right—the property having passed into the separate ownership of the parties.

The question propounded was: Did the creditors' judicial mortgage against one-third interest in the community property precede all claims in rank and subject the property to the payment of the claim of the mortgagee "without regard to any pre-existing indebtedness" of the surviving widow to the defendant, and upon due consideration thereof the court said:

"If there was an amount due by Mrs. J. B. Schiller it was an amount for which her interest in the estate of her daughter was accountable. The two claims, that of the succession as a creditor, and that of Mrs. Schiller as a forced heir of her daughter, were subject to adjustment and settlement in the process of settlement in the latter's succession.

"The mortgage of plaintiff could only be applied to the *residuum* of the settlement."

That proposition being true in a case where a definitive settlement had been made, for a stronger reason must it be true in the instant case, where no settlement had been made at all, and the mortgagor's indebtedness contracted subsequent to the dissolution of the community.

Such was the exact situation of affairs presented in the recent case of *Rawlins vs. Giddens*, 46 An. 1136, in which it was "decreed that the rights of plaintiff under the mortgage claimed by him herein be restricted to the interest of D. M. Giddens in the community between himself and his deceased wife, Mary J. Armistead, to be ascertained in proper proceedings;" no judicial settlement of that community having been made, and plaintiffs' mortgage having been consented subsequent to the death of the wife.

It is of no consequence that there had been no administration of the estate of Mrs. M. A. Cooper, and that no tutor had been appointed to represent the minors. That their rights had remained, in a certain sense, inchoate can not have the effect of defeating the just claims of the intervenors, as creditors of the unliquidated com-

munity, or of estopping them from the assertion of their demands; nor does the fact that the property mortgaged had not been listed for taxation as that of the community divest the rights of the intervenors as community creditors, or operate as a fraud on the rights of plaintiffs as mortgagees. For had they taken timely and proper precaution to scrutinize defendant's title, and to interrogate the defendant with reference to the rights of his deceased wife's children, the difficulty might have been obviated by a proper renunciation, or their interests protected by a declination of the mortgage altogether.

Our conclusion is, that the plaintiffs' mortgage is perfectly good and valid in respect to the defendant, but that it can only be enforced against the *residuum* of defendant's share in the community after the same has been liquidated and settled by the payment of the amount ascertained to be due the intervenors as the heirs of Mrs. M. A. Cooper, deceased.

That while we are satisfied from the record that the deceased was the owner of considerable *separate* property, of which she had the administration and enjoyment, and that the defendant became largely indebted to her for paraphernal funds received and used; that during the existence of the *community*, there was accumulated considerable property which remained in indivision subsequent to its dissolution by the death of the wife, which was primarily liable for the payment of the debt due the deceased; yet, inasmuch as there has been no liquidation and settlement of the community, we are of opinion that all parties should be relegated to this settlement and full adjustment for the ascertainment of their rights, respectively, as we did in the case of *Pior vs. Giddens*, 48 An. 1406, and that of *Rawlins vs. Giddens*, 48 An. 1136.

But this decree is not intended to disturb, or in any manner affect the rights of the plaintiffs under the act of mortgage in respect to the *residuum* of the defendant's share of its assets after community debts are paid; nor to affect the rights of intervenors under the *dation en paiement*, subordinated as it is to the mortgage, in respect to the aforesaid *residuum*—same having been accepted in good faith, on the part of the intervenors, for a perfectly valid and apparently adequate consideration.

And, as the case is to be remanded, it is well to state, for the purpose of simplifying the issues for the court *a qua*, that from the evidence we are satisfied of the following facts, viz. :

Newman vs. Cooper.

1. That the note sued on was never intended or used for any other purpose than as a collateral security for the defendant's current commercial account; and that it was from time to time renewed in writing, and extended, so as to prevent same from running to prescription.

2. That on the face of the plaintiffs' account the apparent balance against the defendant is greater than the amount of the collateral security, though no demand is made for judgment thereon. *Chaffe vs. Whitfield*, 40 An. 631.

3. That the collateral note has never been novated or extinguished by other notes of the defendant subsequently executed for the reason that same were annually executed to and discounted by the plaintiffs and the proceeds thereof placed to the defendant's credit; and, in the usual course of their dealings, same were satisfied by the proceeds of the sale of the defendant's crops and extinguished. *Mix vs. His Creditors*, 39 An. 624.

4. That while it may be true that the plaintiffs have charged the defendant usurious interest and commissions on cotton neither received nor sold, yet plaintiffs rendered their accounts to the defendant regularly, and same were by the defendant acknowledged in writing to be just and correct, and that the effect of said written acknowledgments and waivers is to require of the defendant exceptionally strong proof of error in making same—much stronger than the record affords—before he can be relieved from their effect.

Considering the foregoing established facts, there are only the following questions left open for examination and decision in the course of the settlement and adjustment that is to be made of the community between the defendant and the heirs of his deceased wife, *quoad* the claims and demands of the plaintiff against the defendant, viz.:

1. The amount of the indebtedness of the community to the intervenors, and others, if other creditors there are.

2. The value of the assets of the community liable for the payment thereof.

3. The justness and amount, if any, of the claims of the plaintiffs against the intervenors, on the score of benefits received by them, during the course of their father's negotiations with plaintiffs.

4. The amount of the plaintiffs' claim against the defendant, on open account, as the *primary* obligation of the defendant, and the

Gumbel & Co. vs. Sheriff et al.

amount of the *residuum* of his share of the community assets that are applicable to their payment.

Entertaining these views, it becomes necessary to reform the judgment appealed from.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the plaintiffs have and recover judgment on the note and mortgage sued on only as collateral security for the defendant's current, running commercial account, and with the reservation that same is limited and restricted, in its operation and effect, to the *residuum* of defendant's interest in the property mortgaged, after the liquidation and payment of the debts of the dissolved community between the defendant and the deceased mother of the intervenors and other community creditors; and not to be enforced at all until the final balance of the defendant's primary indebtedness, on open account, is first judicially determined.

It is further ordered and decreed that the intervenors be recognized and decreed the owners in indivision of one undivided one-half of the property mortgaged and other community assets, subject to the payment of community debts, free from the grasp of plaintiffs' special mortgage; and that as heirs of their deceased mother, Mrs. M. A. Cooper, they are creditors of the defendant and of the community to the extent he is ascertained to have been indebted to the deceased at the time of her death; and, as such creditors, they are entitled to be paid out of the defendant's half interest of the community assets in preference to the plaintiffs as his individual creditors.

It is finally ordered that this cause be reinstated and remanded for the purpose of settlement of the *dissolved* community, in conformity to law, and the views herein expressed, and that appellees be taxed with all costs of both courts.

No. 11,645.

FERDINAND GUMBEL & Co. vs. J. A. BOYER, SHERIFF, ET AL.

46 1499/
114 307

1. In case the holder of a negotiable promissory note, in pursuance of an agreement between the maker and the assignee, makes a transfer thereof by written assignment without recourse, this assignment must be interpreted by the precepts of the Civil Code, and not by those of the law merchant.

Gumbel & Co. vs. Sheriff et al.

2. If in place of this formal assignment the holder had placed his simple endorsement on the paper, the assignees could, in all likelihood, have availed themselves of the benefit of the rule that one who assigns to another one of a series of concurrent mortgage notes can not come in competition with the assignee, if the security be insufficient to pay both.
3. The legal effect of the transaction under consideration is a payment by third opponents with subrogation, which does not give the assignees any right of preference over the assignor, for the balance remaining due him.

A PPEAL from the Tenth District Court, Parish of Avoyelles.
Coco, J.

G. H. Couvillon for Plaintiffs, Third Opponents, Appellees.

William H. Peterman and Clegg & Thorpe for J. A. Boyer, Defendant, Appellant.

The opinion of the court was delivered by

WATKINS, J. This suit is brought by way of third opposition, opponents, F. Gumbel & Co., claiming the proceeds of the sale of property sold under and by virtue of the executory proceedings of J. A. Boyer vs. J. V. Moreau, in the foreclosure of a mortgage; by reason of their alleged precedence in rank of privilege and mortgage, resulting from an assignment to them of another of the same series of mortgage notes by J. A. Boyer, the seizing creditor, the proceeds of sale being insufficient to pay both.

To this third opposition the seizing creditor replied in answer, that opponents never *purchased* the note in question, but *paid* same, and thereby extinguished the mortgage securing its payment. Hence the sole question for the court to determine is whether the transaction between the parties was a *purchase* or payment of the note opponents found their claim upon.

This suit was brought before this court last year, and was remanded for the purpose of permitting the introduction of certain evidence that had been rejected by the court *a qua*, and this evidence having been admitted on a second trial, it is again before us for final decision. *Ante*, 46 An. 762.

It appears from the evidence that opponents were cotton factors, doing business in New Orleans, and that J. V. Moreau, the mortgagor, was their client, and had an open running account with them at the

date of the transaction in question. That in December, 1881, Moreau purchased of Boyer a plantation, executing a series of several notes for the purchase price, securing same by special mortgage. It is with regard to one of these notes that this controversy took place.

It seems that Moreau requested opponents to pay Boyer this note on presentation by him, but that on presentation payment was refused—first, because the letter to that effect was not written by Moreau personally; and, second, that they did not wish to *pay*, but would *purchase* the note if Moreau requested them to do so.

On account of the delay incident to opponents obtaining a communication from Moreau on the subject, Boyer left the note in the hands of Hernandez, his own factor, for *collection*, and placed a transfer on the reverse of it—the endorsement being couched in the following words, viz.: “For value received, I hereby transfer the within note to Ferdinand Gumbel & Co. with all of the rights and interest I have in said note, without recourse against me.”

When Boyer subsequently met Moreau, he informed him that opponents would require a letter from him (Moreau) before he would “pay the note,” thus evidencing the clear and evident impression of Boyer to have been that opponents would *pay* the note, and that his written endorsement was intended to facilitate this arrangement.

It appears to us to be of little consequence what was the character of the negotiations between opponents and Moreau, for, assuredly, they were powerless, by any mere convention of theirs, to perfect the *sale* of the note from Boyer to opponents. To accomplish this object, the assent of Moreau, the debtor, was altogether unnecessary and unavailing. The proof shows that, at the time of this transaction, Moreau had shipped sufficient cotton to the opponents to cover his debits and leave a small balance to his credit; and that he had additional cottons to ship them. It further shows that at the end of the season Moreau had a cash balance to his credit of about fifteen hundred dollars, not taking the *note* into consideration. It appears from the evidence that after third opponents filed their petition claiming the *whole* amount, they, *on their own motion*, placed that amount to Moreau's credit on the note.

Consequently, at the time of the correspondence between opponents and Moreau, it was, evidently, a question of doubt as to whether there would be a sufficient amount to the latter's credit at the end of the cotton season to liquidate the note, and hence the

Torlan vs. Weeks.

evident hesitancy of opponents to *pay* the note for Moreau, and thus place themselves in a situation in which they might sustain a loss, as payment would destroy the security of a mortgage, and the funds in their hands be insufficient to meet Moreau's account.

It thus becomes quite clear to our minds all that third opponents could claim is that the *legal* effect of this transaction was a payment with subrogation to all the rights of Boyer against Moreau. But that being conceded, the written endorsement of Boyer on the note, when read in the light of the acts of the parties, could not be given the effect of placing the opponent's privileges in the front rank and giving same preference over that of Boyer. The words of the assignment, "without recourse against me," would be rendered meaningless otherwise.

If, in place of the formal transfer without recourse, Boyer had placed his simple signature on the note, opponents could have in all likelihood availed themselves of the benefit of the rule of the commercial law to the effect that one who assigns to another one of a series of concurrent mortgage notes can not come in competition with the assignee if the security be insufficient to pay both.

Our Civil Code establishes a contrary rule as governing a case of this kind. It declares that such payment with subrogation "can not injure the creditor, since, if he has been paid but in part, he may exercise his right for what remains due, *in preference* to him for whom he has received only a partial payment." Revised Civil Code, 2162.

In the lower court there was judgment in favor of the plaintiff, decreeing him entitled to be paid the full amount of his claim out of the proceeds of sale in preference to Boyer, the seizing creditor. That judgment must be reversed and the demands of opponents rejected.

It is therefore ordered and decreed that the judgment appealed from be reversed and annulled, and the demands of plaintiff rejected at his cost in both courts.

Rehearing refused.

No. 11,609.

WALTER J. TORIAN, JR., vs. WILLIAM F. WEEKS.

1. Claim may be made in same suit for the wages of an overseer, the value of crops disposed of, that of supplies and money furnished to make and gather a crop of rice and for the use and hire of teams employed thereon, and the

 Torian vs. Weeks.

board of laborers—the allegations and proof disclosing that the plaintiff was at one and the same time overseer for the defendant on one plantation and that the two were engaged in the cultivation of another on shares. All of these items are matters properly embraced in one general plantation settlement between the parties.

2. The proof administered on the trial of an exception of want of proper parties, plaintiff disclosing the fact that the contract relative to planting a crop on shares was made and entered into by and between the plaintiff and defendant *alone*, the former is capacitated to sue the latter in the enforcement thereof, notwithstanding the former subsequently made an agreement with a *third person* whereby he was to share his interest—the defendant not being advised of such subsequent agreement and consequently not participating therein.
3. Having ascertained, for the purpose of determining the *status* of the exception, that the third person was not a necessary party plaintiff, the trial and decision of the plaintiff's demands can not be embarrassed thereby on the merits.

A PPEAL from the Nineteenth District Court, Parish of Iberia.
Voorhies, J.

Foster & Broussard for Plaintiff and Appellant.

Gilbert L. Hall for Defendant and Appellee.

The opinion of the court was delivered by

WATKINS, J. Plaintiff sues for three thousand one hundred and ten dollars and two cents as the balance due on a stated account annexed to his petition; and his claim is, *first*, for wages as overseer for ten and one-half months, in the year 1892, at fifty dollars per month, aggregating five hundred and twenty-five dollars; *second*, for supplies advanced to the defendant and used upon the plantation of which he had the management, and also for the service and use of his teams and implements in the cultivation of same, aggregating one thousand seven hundred and sixteen dollars and eight and one-half cents; and *third*, for the value of one thousand and ninety sacks of rice at two dollars and seventy-five cents per sack, which was produced by plaintiff on the land of defendant, which was cultivated on shares.

The annexed account shows total amount of debits against defendant of five thousand one hundred and ninety-three dollars and eighty-three cents, subject to credits amounting to two thousand and eighty-three dollars and eighty-three cents—leaving the resulting balance stated above.

Torian vs. Weeks.

There is a discrepancy between the petition and the account in respect to the amount of the account for supplies and the labor furnished—the amount claimed in the petition being two thousand five hundred and eighty-five dollars and two cents, while that shown by the account is only one thousand six hundred and ninety-six dollars and thirty-eight and one-half cents. The latter is controlling.

The record shows that the plaintiff engaged his services to the defendant as an overseer on one of his plantations for the year 1892, and that the two made an agreement to cultivate one hundred acres of another place on shares during the same year—the plaintiff to receive two-thirds and the defendant one-third of the rice thereon produced.

In limine the defendant tendered several exceptions: (1) that the plaintiff has improperly cumulated inconsistent and contrary causes of action; (2) that the petition is vague and indefinite, not setting forth the dates, places and circumstances of the various contracts and covenants which are alleged upon with sufficient certainty to enable him to plead thereto; (3) that it does not set forth any agreement to furnish supplies, teams or implements for any particular plantation, and when made, either written or verbal; (4) that the allegations of the petition set forth no cause of action; (5) and, finally, that proper parties plaintiff were not made, because one Montgomery was a partner of plaintiff in the cultivation of the crop, which was cultivated on shares.

These exceptions having been overruled the defendant filed an elaborate answer, which is of the following tenor, viz.:

1. "That he employed plaintiff as overseer on his rice plantation in February, 1892, for the year, at fifty dollars per month; but that he only worked nine months, and left his premises in the early part of December, to the serious neglect of his duty and to the great injury of the respondent." That he paid him ninety-nine dollars and seventy-five cents on his account for services in April, 1892, and that it was agreed and understood between them that the residue of his wages were to be, by the defendant, retained as security for advances that were to be made by the defendant to the plaintiff, Torian, and his partner, Montgomery, to enable them to make and gather a crop of rice they cultivated with him on shares.

2. That Torian & Montgomery were wholly without means to make a crop for themselves, and that plaintiff never furnished a

dollar in money, or its equivalent, to make a crop for the respondent, or to pay off his laborers.

3. That plaintiff did not do any hauling, ploughing, or any kind of work to make the crop, except with the teams of respondent; and that if the plaintiff so used his own teams it was unauthorized, and not ratified by respondent, who had an abundance of teams of his own; and he consequently denies and disavows all liability on that score.

4. That he entered into a contract with Torian & Montgomery to cultivate one hundred acres of land in rice, on shares at their own expense, one-third of which was to belong to respondent and two-thirds to Torian & Montgomery. That all of said crop was to be shipped to the account of the respondent, and that he was to be reimbursed from the proceeds thereof the value of supplies he may have made to them on the partnership crop.

5. He charges that during his absence Torian & Montgomery worked their crop and his, indiscriminately, cut and harvested his and their crops together—all without his knowledge or authority—and so as to render same indistinguishable. That they secretly shipped to G. W. Sentell & Co., in violation of their contract, three hundred (300) sacks of rice, which was sold for their account, and for which they retained the proceeds. That they likewise shipped the remainder of the crop to Flower & King, and retained the proceeds until they were forced to surrender same, under threats of a criminal prosecution.

The answer admits all the credits enumerated on the plaintiff's account—alleging same to have been for the supplies he had furnished Torian & Montgomery.

He alleges, further, that he advanced them during the year 1892 the sum of four thousand and forty-seven dollars and ninety-four cents in supplies, for which the firm of Torian & Montgomery are indebted to him.

He prays that the plaintiff's demands be rejected, in so far as they conflict with the averments of this answer; and that he have judgment in his favor, declaring that the planting partnership of Torian & Montgomery carried on a rice-planting adventure with respondent on shares, whereunder said firm was to receive two-thirds and respondent one-third of the crops produced; and that he have and recover from them, on his reconventional demand, the sum of four

Torian vs. Weeks.

thousand and forty-seven dollars and seventy-four cents for advances and supplies furnished to make the crop. That they be credited with two-thirds of the proceeds of the rice when sold, or its value when ascertained; and that the plaintiff, Torian, be credited with the amount of his overseer's wages for nine months, less the sum of ninety-nine dollars and seventy-five cents—the defendant to have judgment for the resulting balance in his favor.

A trial was had on the issues thus made up, and a judgment rendered in favor of the plaintiff for the sum of four hundred and thirty-nine dollars and twenty-two cents—rejecting defendant's re-conventional demand as of non-suit.

After an unsuccessful effort to obtain a new trial, the plaintiff appealed, and in this court assigns that he is entitled to have the judgment in his favor so increased as to award him the full amount he claimed in the petition; and the defendant joins in the appeal and demands judgment over against the plaintiff for one thousand and thirty dollars and seventy-two cents and all costs.

As it is a question of serious controversy between the parties, and urged by the defendant in exception, answer and argument, we must determine at the beginning whether Montgomery and the plaintiff, Torian, were partners in the planting enterprise; and answering that query, we will state that the evidence satisfies our minds, as it satisfied the mind of the District Judge, that the contract was, primarily, between the plaintiff individually and the defendant, though it subsequently transpired that Torian agreed to let Montgomery have an interest with him without the knowledge or concurrence of the defendant. Consequently, Montgomery, as well as all the issues and defences predicated on his being a partner, may be omitted from further discussion.

With regard to the disposition made by the District Judge of the other exceptions, we are in accord with the views he expressed.

He was of the opinion that plaintiff had not improperly cumulated inconsistent demands, but that, on the contrary, the demands of the petition were of such character as the law favors the consolidation.

He also held that the allegations of the petition are not vague or inconclusive, and sustained the cause of action as well stated.

All other exceptions were relegated to the merits to stand as parts of the answer.

Torlan vs. Weeks.

But, notwithstanding the views that were entertained by the judge *a quo* with regard to the partnership of Torlan & Montgomery, in deciding the exceptions as to the proper parties, he declined to entertain or consider the plaintiff's demands for the use of teams and utensils, and work done therewith for the defendant, "because the mules and carts were not his property, but that of the planting partnership of Torlan & Montgomery." This appears, to our minds, inconsistent. If we are not to consider Montgomery as a partner for the purposes of the exceptions, we can not in respect to the answer and the trial of the merits.

On the merits, we find the following facts substantially proved, viz.:

First: That the plaintiff made a contract with the defendant to superintend and manage one of his plantations as an overseer, for and during the year 1892, at a salary of fifty dollars per month; and that his services under the contract began on the 16th of January and continued until the 2d of December, at which date the defendant consented that he should leave. He was, consequently, entitled to receive ten and one-half months' wages, equal to five hundred and twenty-five dollars, the exact amount claimed on that score.

This is admitted in defendant's answer and brief, with the qualification, however, that he had paid him in April, 1892, the sum of ninety-nine dollars and seventy-five cents in the value of seed rice.

But, as there is no special agreement between the parties that this sum should be imputed as a credit on plaintiff's wages as overseer, and as he placed same to the defendant's credit on his general account, we prefer to treat this item under a different head, and hold the defendant for the entire sum, as an item of debit on the account as stated, no part of said wages having been otherwise paid.

Second: That the plaintiff and defendant entered into an agreement under which the plaintiff was to cultivate one hundred acres of defendant's land in rice, during the year 1892, on shares, the defendant to receive one-third of the crop of rice produced, and to pay the expense of harvesting, threshing and hauling same, and the plaintiff to receive the other two-thirds, and to do all the work and pay all expenses other than those enumerated. Or, in other words, Weeks was to furnish the land, seed rice and machinery—such as reapers, binders and threshers, and to pay for one-third of the harvesting expenses, and furnish his own sacks, and sack his one-third

Torian vs. Weeks.

of the rice; and Torian was to be at all other expense and labor in the cultivation and manufacture of the crop.

Subsequent to the perfection of this agreement the plaintiff, Torian, made an agreement with Montgomery to take an interest with him in this rice crop adventure, but, as we have already stated, without the knowledge of the defendant, Weeks. Hence the original contract was unaffected by the arrangement between Torian and Montgomery, and the only interest that the defendant had was in realizing his one-third of the rice.

Under this agreement the land was cultivated and the yield of rice amounted to two thousand and eighty-five sacks, entitling the plaintiff to receive one thousand three hundred and ninety and the defendant to receive six hundred and ninety-five—the contract between Torian and Montgomery being that they were to share equally. This is shown by testimony of three or four witnesses. The testimony further shows that the plaintiff shipped three hundred sacks of this rice to G. W. Sentell & Co., of New Orleans, and one thousand and seventy-two to Flower & King, likewise of New Orleans, and that the remaining eighteen sacks were retained on the plantation. This was the share of the plaintiff, Torian. Of the three hundred sacks he and Montgomery received the proceeds and defendant received the remainder; though he has not paid same over to the plaintiff, nor rendered him any account thereof. This was admitted by Weeks on the witness stand.

From the foregoing it is clear that *the defendant is liable to the plaintiff for the market value of one thousand and ninety sacks of rice on a settlement of accounts.*

It is in proof that this crop of rice was harvested during the months of September and October, and was shipped during the latter part of October and the early part of November of 1892. The three hundred sacks that were shipped to Sentell & Co. were sold in October, and the proceeds thereof received by the plaintiff, and the account sales show that same was sold at prices ranging from \$2.40 per sack to \$2.75. This is the price plaintiff demands; though the position the defendant assumes is that the rice that is in the hands of Flower & King has not been disposed of, and that he can not be compelled to make a settlement until sales are made, and that he will only be liable to the repetition of the amount *actually received*. Our opinion is that the plaintiff is entitled to the value of the rice at the time it went to

market, and *might have been sold*, particularly in view of the fact that the plaintiff's instructions to Flower & King were to sell at that time.

We note the contention of the plaintiff's counsel to the effect that a *sack* of rice contains one and a quarter barrels, and upon that estimate he is entitled to compensation for one thousand three hundred and forty barrels, as the contents of one thousand and ninety sacks. But we are not disposed to adopt that basis of calculation, inasmuch as all the transactions of the parties have been predicated upon *sacks*, and not upon *barrels* of rice.

Taking a *mean* between the two extremes, we find two dollars and fifty-seven and one-half cents per sack to be about the correct figure; and at that price one thousand and ninety-two sacks would be worth two thousand eight hundred and eleven dollars and ninety cents.

This amount the defendant has not paid to the plaintiff nor accounted therefor; and he is, therefore, responsible to him for that sum on settlement of accounts, less the approximate charges and expenses of shipping and selling the one thousand and ninety sacks of rice, which may be safely fixed at seven hundred dollars—thus placing the net proceeds of plaintiff's crop at two thousand one hundred and eleven dollars and ninety cents.

In this estimate we have placed the value of five dollars per sack on the eighteen sacks of seed rice which plaintiff left on defendant's place, making ninety dollars in all; and in so doing we thought it a just estimate, as defendant had charged the plaintiff ninety-nine dollars and seventy-five cents for fifteen sacks of seed rice furnished him in April previous.

Third: The claim for supplies and labor furnished may be properly and conveniently divided into three items, as the plaintiff's counsel have divided it in their brief, as follows, viz.:

- (a) Cash paid to laborers on defendant's plantation, seven hundred and seventy-six dollars and fifty-five cents.
- (b) Amount for ploughing, hauling and use of teams, six hundred and eight dollars and thirty-five cents.
- (c) Amount expended in moving crops and board of hands, etc., three hundred and eleven dollars and eighteen and one-half cents, the three items aggregating one thousand six hundred and ninety-six dollars eight and one-half cents.
- (a) With regard to the cash paid laborers, the plaintiff, as a wit-

Torlan vs. Weeks.

ness, states—making reference to the items of his account—that in June, 1892, he paid out forty-six dollars, which he had realized from the sale of cattle. That “the amount paid was for the benefit of Mr. Weeks—paying his hands for working his place; the portion (plaintiff) was managing—i. e., his individual crop.” That in July he expended, from the same source and for like purposes, thirty-four dollars and sixty cents for the defendant’s account. That in September he expended in the same manner two hundred and nine dollars; and in October one hundred and twenty-eight dollars and twenty cents; and in November three hundred and thirty-nine dollars and thirty-five cents. He says that he raised these amounts principally from the discount of his drafts on Sentell & Co., to whom he had shipped three hundred sacks of rice.

This accounts for all the items on his account except one of twenty dollars, which he explains by pointing out a credit on his account of fourteen dollars in favor of the plaintiff, and thus entitling him to this item also.

The defendant, as a witness, as well as in his answer, disavows all authority for or knowledge of these transactions; but the statement of the plaintiff is plain and straightforward, and he gives the dates, circumstances and amounts paid.

In addition to these facts, it is in evidence that the defendant was absent from the State during the greater part of the time and could have had no personal knowledge of them. If indeed, as it appears, the plaintiff did furnish the laborers on the defendant’s plantation, he ought to be reimbursed his outlay; and being the trusted agent and overseer of the plaintiff, it can not be fairly presumed that he did not exercise good judgment in making the expenditures.

But it appears that some of the items are somewhat questionable, at least to the extent of about two hundred dollars, and, giving defendant the benefit of the doubt, we will reduce the total amount of this item to five hundred and fifty-seven dollars and fifteen cents.

(b) With regard to the item for ploughing, hauling, use of teams, etc., the plaintiff points out the various items on his account, making the aggregate sum claimed, and states that the first two items of nine dollars and seven dollars and fifty cents were for hauling lumber for the building in which he lived on the plantation he was overseeing for the defendant. The next item of ten dollars was for ploughing land on the same place, with witness’ own teams, in March

Torlan vs. Weeks.

of that year. The next item of twenty-one dollars is for six days' harrowing on defendant's place with witness' own mules. And so, through the entire account, he identifies and explains each and every item that is charged against the defendant.

Not only is this the positive statement of the plaintiff, but it is supported by the testimony of at least four apparently disinterested witnesses, who are equally as emphatic and uncontradicted. And several witnesses state that the prices charged are customary and reasonable.

There are two or three items, about the amount of which there is some doubt, and we think it but fair to make a reduction of one hundred and thirty-five dollars, making the total amount due plaintiff on this score four hundred and seventy-three dollars and thirty-five cents.

(c) With regard to the amount expended by the plaintiff in saving crops of the defendant, and in board of laborers, the plaintiff, as witness, states that he paid the entire expense of harvesting the crop which was cultivated on shares, and that the defendant's portion thereof was two hundred and thirty-five dollars and seventy-eight cents, as stated in his account; and, under the contract, the defendant was responsible for that expense. By "saving" the crop witness states that he meant cultivating, threshing and harvesting the crop of rice, and hauling the sacks of rice to the depot for shipment. He furnishes the names of the defendant's laborers whom he boarded, and for which he makes a charge in his account of seventy-six dollars, and states that he boarded them at different times during the year, and furnished the provisions to feed them. That they were carpenters, engineers and field hands. That he furnished and paid the board of the hands—charging only twenty-five cents per day. He is supported in his testimony by Montgomery, who says that he lived in the house with Torlan, and was cognizant of the facts detailed by Torlan, and the charges made are legitimate. The next item is for the value of a cooking stove and utensils which he purchased and expended twenty dollars for it. That it was left in defendant's possession, and he has refused to surrender it upon demand. The stove and other articles are worth twenty dollars.

It is equally well established that the plaintiff paid Foster & Broussard nineteen dollars and forty cents for account of the defendant.

Torlan vs. Weeks.

But inasmuch as the plaintiff had the use of the stove and cooking utensils for one year, we are of the opinion that ten dollars would be enough for them.

This claim should then be placed at three hundred and twenty-one dollars and seventy-eight cents. The three items—*a b* and *c*—will aggregate then the sum of thirteen hundred and fifty-two dollars and twenty-eight cents instead of sixteen hundred and ninety-six dollars and ten and a half cents, as claimed in the plaintiff's petition. Consequently, we have this statement of plaintiff's demands, as established by the evidence, viz.:

1. Overseer's wages	\$523 00
2. Proceeds of plaintiff's two-thirds interest in crop	2,111 90
3. Expenditures, expense of labor, utensils, etc.	1,352 28

Aggregating the sum of three thousand nine hundred and eighty-nine dollars and eighteen cents (\$3989.18), which is subject to credits admitted on the face of plaintiff's account, aggregating two thousand and eighty-three dollars and eighty-one cents, leaving a net balance in plaintiff's favor of one thousand nine hundred and five dollars and thirty-seven cents.

This brings us to the consideration of defendant's reconventional demand for the sum of four thousand and forty-seven dollars and seventy-four cents for supplies furnished the plaintiff to enable him to make the crop which was cultivated on shares, including money advanced.

At the outstart plaintiff's counsel attract our attention to the fact that, notwithstanding the defendant in his answer formally admits the truth and correctness of the items of credit which are given him on plaintiff's account—and which aggregate in amount two thousand and eighty-three dollars and eighty-one cents—he claims judgment against the plaintiff on his reconventional demand for *identically the same items of credit again*. And our examination and comparison of the two accounts fully verifies the correctness of this statement.

For instance, we find in the defendant's account, on which his reconventional demand is predicated, the following entries, viz.:

In March, cash	\$28 45
In April, cash	25 25
In May, cash	27 40
In May, one beef	15 00
In June, cash	16 00
In June, feed for stock	28 00
In August, cash	14 00
In September, cash	27 80
In October, for rice sacks	125 00
Twine	56 90

 Torian vs. Weeks.

Cash, October	142 00
Supplies furnished Dreyfous	865 25
Threshing 1890 sacks of rice	189 80
Draft cashier	450 00
Draft cashed (April)	181 65
Draft cashed	260 00
Eighteen head of cattle (sold during year)	142 00

These amounts aggregate one thousand nine hundred and ninety-three dollars—only a few dollars less than the amount of credits admitted on plaintiff's account, and of similar amounts and dates.

And a further examination and comparison made of the two accounts will show that the difference between them in favor of the defendant is thus made up, viz.: By charging in the month of March amounts in cash paid aggregating thirty-one dollars and sixty cents, in addition to the charge of twenty-eight dollars and forty-five cents above specified for that month. By charging cash items in April of two hundred and sixty-four dollars and ninety-two cents, in addition to the charge of twenty-five dollars and twenty-five cents, specified for that month; and *including the item of one hundred and thirty-one dollars and sixty-five cents for a draft cashed in April, already charged in his account as above specified.* By charging in May cash items aggregating eighty-three dollars and seventy-five cents, in addition to the charge of twenty-seven dollars and forty cents and fifteen dollars specified for that month. By charging in June cash items aggregating ninety-three dollars and ten cents, in addition to the items of sixteen dollars and twenty-eight dollars which are specified for that month.

These are manifestly *double charges*, and they aggregate in amount five hundred and fifteen dollars and seventy-seven cents, and this amount should be deducted, as well as the sum of one thousand nine hundred and ninety-three dollars, as above specified, as *double entries or duplicate charges*.

The two sums aggregate in amount two thousand five hundred and eight dollars and seventy-seven cents.

Eliminating all of the foregoing duplicate charges from the defendant's account, and we have for examination the following remaining charges, viz.:

To one cart	\$90 00
Mules	1,080 00
In August, cash	9 60
In October, cash	10 00
On November 14, repairs, etc	14 00
November 14, cash paid	150 00
Cash from P. S. Towles	20 00
Sacks of twine (October)	119 21
Six beeves	75 00

Torian vs. Weeks.

These amounts aggregate the sum of one thousand five hundred and sixty-seven dollars and eighty-one cents. Taking up these items in the reverse order we find the following to be the facts exhibited by the record, viz.:

1. As to the six beeves, for which a charge of seventy-five dollars is made, it seems quite apparent that they are included in the general item of "eighteen head of cattle sold during the year," and for which a charge is made of one hundred and forty-two dollars. This item must be disallowed.

2. The six (6) preceding items are somewhat involved in doubt.

We are not advised of the true significance of the term "sacks of twine," and we can not appreciate the necessity for the use of one hundred and nineteen dollars and twenty-one cents worth of twine, in view of the fact that the plaintiff is previously charged with fifty-six dollars and ninety cents for twine in October.

But we will give the defendant the benefit of the doubt—though not entitled to it in law, nor in equity—and allow him the full amount of these items aggregating three hundred and twenty-two dollars and eighty-one cents.

The only two items remaining for our consideration are those for the cart and mules, and also the item for seed rice furnished the plaintiff in April of nine-nine dollars and seventy-five cents—previously adverted to.

This last item is admitted in plaintiff's account to be correct, and defendant is credited with that amount, and consequently he is also entitled to this additional allowance on his reconventional demand.

With regard to the item of one thousand and eighty dollars for mules, it will appear from the record that a note was executed for that sum in February, 1892, in favor of A. B. Murray, representing the purchase price of six mules and signed by Torian, Montgomery and the defendant. That suit was brought on said note against all the parties and same is still pending—Murray having assigned his rights to G. L. Hall, who is the attorney for the defendant in this suit. The defendant has paid no part of said note for the price of the mules beyond the sum of two hundred and fifty dollars—his claim in his answer to the suit of Murray being that he is a simple endorser on the note, and that he has been discharged by reason of the principal debtors, or makers having been granted an extension of time. It does not make any difference, in so far as this case is

Torlan vs. Weeks.

concerned, as to what the outcome of *that* case may be, as it is quite evident that the defendant, Weeks, is not entitled to credit with the plaintiff for an amount in excess of the two hundred and fifty dollars he is shown to have actually paid. *Non constat* that the defendant will ever pay, even if the plaintiff does not.

The same is true in regard to the ninety dollars that is claimed as the price of the cart. The evidence disclosed that a similar note was furnished in this instance, and that no part of the same had been paid.

Hence the only items on the account of the defendant to which he is entitled to credit are the following, viz.:

1. The aggregate of the six items preceding the last above enumerated, amounting to three hundred and twenty-two dollars and eighty-one cents.

2. The item for seed rice, ninety-nine dollars and seventy-five cents.

3. The cash paid on note for mules, two hundred and fifty dollars.

The whole amounting to the sum of six hundred and seventy-two dollars and fifty-six cents.

We however note the contention of plaintiff's counsel with regard to the item of *one hundred and fifty dollars cash paid on November 14*, and the explanation given of it by the plaintiff, and which is to the effect that Towles brought down to the plaintiff one hundred and ten dollars in cash and an order on Papet for forty dollars. That he collected on the order only thirty-two dollars, and he consequently gave the defendant credit for the one hundred and ten dollars and the thirty-two dollars collected, the two amounts aggregating one hundred and forty-two dollars, which amount is specified on the plaintiff's account as a debit against himself, thus, viz.:

"October—By cash, one hundred and forty-two dollars;" and on the defendant's account it is specified as a charge against the plaintiff, thus, viz.: "Cash, one hundred and forty-two dollars."

The effect of this explanation is to show that this item of one hundred and forty-two dollars is *identically the same as the previous item*, "*November 14, 1892, cash paid, one hundred and fifty dollars.*"

The statement of the plaintiff is fully corroborated by the testimony of Towles. Therefore, on a more careful inspection of the evidence we have become satisfied that the item of one hundred and fifty dollars is an erroneous, or double entry, and should be de-

Torlan vs. Weeks.

ducted from the amount previously allowed, thereby reducing the amount to which the defendant is entitled to five hundred and twenty-two dollars and fifty-six cents.

Deducting this sum from the amount of one thousand nine hundred and five dollars and thirty-seven cents that is awarded the plaintiff on his demands, and there will remain a net balance due the plaintiff of thirteen hundred and eighty-two dollars and seventy-one cents, for which he is entitled to judgment.

We have examined this voluminous transcript, and the elaborate briefs of counsel on either side, with great deliberation and care, and arise from a study of the case with a clear conviction that the judgment appealed from should be amended and increased in plaintiff's favor, so as to award him the full sum specified, and so as to reject and disallow the defendant's reconventional demand *in toto*, except as above specified.

It is therefore ordered, adjudged and decreed that the judgment appealed from be so amended and increased as to entitle plaintiff to have and recover of and from the defendant the sum of thirteen hundred and eighty-two dollars and seventy-one cents over and above the amount awarded the defendant on his reconventional demand; and so as to reject and disallow the defendant's reconventional demand in all other respects, the defendant and appellee to pay all costs of both courts.

ON APPLICATION FOR REHEARING.

The following statement extracted from the brief of the defendant's counsel puts very clearly the points on which he places reliance, viz.:

We respectfully submit that the judgment should be corrected by deducting an overcharge for two sacks of rice (which the court has fixed at 1092 sacks, when it was 1090) at \$2.57½ per sack	\$5 15
The charge of \$5 per sack for 18 sacks (\$90) should be reduced to \$1.50 per sack, or \$27, a reduction of	63 00
There should be a credit given Mr. Weeks for bill of Torlan's he paid Dreyfous	36 00
A bill Mr. Weeks paid for repairs to cart for Torlan	14 00
For bill Mr. Weeks paid Kochs	8 75
The amount Torlan's rice brought is for 250 sacks marked T.M. and claimed by him in his petition and account as specifically his, giving him its best prices for 52 sacks (Trans., p. 330), at \$1.50 per sack	44 28
And for remaining 198 sacks at \$1.10 per sack, 198-224 of \$90	79 20
The 22 sacks marked O X, which he claims is at about \$2.30 per sack	50 60
There were 400 sacks marked X shipped to account of Torlan & Montgomery (Trans., p. 24), the mean price of the rice marked X we have seen is \$1.03	412 00
The mean price of the rice marked X O X, of which Torlan claims 400 sacks, we have seen is \$2.37½ per sack	950 00

The statement with regard to the error of two sacks of rice having

been allowed the plaintiff in excess of the allowance demanded in his petition is correct.

That is a mere clerical error, and it should be corrected, of course.

The second error assigned with reference to the eighteen (18) sacks of rice that were left on the defendant's plantation can not be entertained. We think that this item was correctly disposed of in our opinion. In April of 1892 defendant let the plaintiff have *fifteen* sacks of rice for seed, and charged him ninety-nine dollars and seventy-five cents therefor; that is, at the rate of six dollars and sixty-five cents per sack; and the proposition submitted for our approval is, that for eighteen sacks of rice that plaintiff left on the defendant's place in December of the same year, the latter should account at the price of one dollar and fifty cents per sack—a difference of five dollars and fifteen cents reduction in value per sack within a period of eight months. This seems anomalous, in view of the fact that defendant demanded and has been allowed the price of two dollars and fifty-seven and one-half cents per sack for the two sacks that were awarded the plaintiff through error.

We think that the defendant has no just ground of complaint of our opinion on this score, allowing the plaintiff only two dollars and fifty-seven and one-half cents per sack, while we at the same time approved of the defendant's demand for six dollars and sixty-five cents per sack sold the plaintiff in April.

The three items of thirty-six dollars, fourteen dollars and eight dollars and seventy-five cents—while not covered by the accounts of the parties nor in the pleadings—may, as a matter of justice, be allowed the defendant. These items aggregate fifty-eight dollars and seventy-five cents.

The remainder of the statement is satisfactorily disposed of in our opinion, and our argument need not be repeated.

Conforming our opinion and decree to the foregoing observations, it is ordered and decreed that the amount awarded the plaintiff be reduced by the sum of sixty-three dollars and ninety cents, and as thus amended and reduced the same be affirmed.

Rehearing refused.

State vs. Flournoy.

No. 11,629.

STATE OF LOUISIANA VS. LEM FLOURNOY.

1. That an indictment for the crime of embezzlement of a clerk or depository, under Sec. 905 of the Revised Statutes, is not defective or insufficient because not stating that a demand had been made for the return of the money or property embezzled.
2. The question of such demand having been made is one that appertains rather to the *quantum* of evidence sufficient to convict, and not to the sufficiency of the allegations of the indictment.

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

M. J. Cunningham, Attorney General, and *John R. Land*, District Attorney, for Plaintiff, Appellant.

Defendant, Appellee, unrepresented by counsel on appeal.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted under Sec. 905 of the Revised Statutes denouncing the crime of embezzlement against an agent, clerk, trustee, mandatary, depository, etc.

To the indictment the defendant's counsel filed a motion to quash on the ground that same "is not sufficient in law;" and the motion having been sustained and the indictment quashed, the State has appealed.

Was the indictment sufficient in law?

The phraseology of the indictment is as follows, viz.:

"That Lem Flournoy, being then and there depository of J. Thomas, did then and there, by virtue of his said trust, have, receive and take into his possession one cow, of the value of twenty-five dollars in United States currency, of the property, goods and chattels of the said J. Thomas, the said Lem Flournoy's said depositor, and the said Lem Flournoy, depository as aforesaid, the said cow, then and there feloniously and wrongfully did embezzle, use, and dispose of, contrary," etc.

The trial judge assigned the following reasons for sustaining the motion and quashing the indictment, to-wit:

46 1518
118 557
1118 558

Stéte vs. Flournoy.

"Because the indictment failed to allege that a demand had been made for the return of the property alleged to have been embezzled. Although it does not say so explicitly, in the case of the embezzlement of private property (which was the case here) it would seem that the mere failure to pay should not be sufficient to convict.

"There should, in such a case, be shown a demand as an essential ingredient for conviction, from which a wrongful or felonious appropriation could be inferred. The failure to pay *without proof of such demand*, that is of itself, would not therefore be sufficient to convict.

"This quotation is taken from State vs. O'Kean, 35 An. 901, in which it was held that before the offence of embezzlement can be made out, it must appear that a demand for the property embezzled was made; and whatever is essential to be proved, it is essential to allege.

"See Desty Criminal Law, Sec. 146; 2 Bishop Criminal Law, Sec. 37."

The counsel for the State insists that the principle quoted by the trial judge from the O'Kean case relates to the *quantum of evidence* sufficient to convict, and not to the adequacy of averment in the indictment charging the embezzlement; and that the question in that case arose with respect to the charge of the judge, and not with respect to a motion to quash the indictment.

An examination of the O'Kean case discloses that language quoted by the trial judge from our opinion is found under the head styled "the *third* ground of complaint," which was "that the judge (had) refused to charge the jury that the *failure* of the accused to pay over the money, if unexplained, does not of itself raise a presumption of a felonious appropriation sufficient to convict."

And it further appears from our opinion that the requested charge ought to have been given by the trial judge, though it was not—citing the authorities—and we said: "Decreeing that the charge included in the third bill should have been given, we must remand the case."

It is clear, therefore, that the expression of the court selected from that case was in reference to the charge of the judge to the jury, and not to a motion to quash the indictment.

Not only is such the case, but the opinion furnishes still further proof of the inapplicability of the principle announced to the *sufficiency of an indictment* for embezzlement, in that upon the exami-

State vs. Flournoy.

nation of the second bill of exceptions it stated "that the judge refused to instruct the jury: 'That the information charges that the money was embezzled as a clerk, and the evidence establishes the fact that the prisoner was a solicitor and salesman. Upon such showing and under such circumstances, the prisoner should be acquitted of the charge as laid in the indictment.' This charge implied the expression of a knowledge of the facts and required a comment upon the evidence. It appertained exclusively to the jury to ascertain and determine whether or not the accused * * * was in the employ," etc.

From the foregoing it seems that the defendant was simply indicted for embezzlement as a clerk, and while not passing on the question of the sufficiency of the indictment, yet it is manifestly inferable from all that was said that it was not deemed objectionable; and we glean from what was said that the indictment in that was similar to the one in the instant case.

This particular kind of embezzlement is defined thus:

"Any servant, clerk, broker, agent, consignee, trustee, attorney, mandatary, depository, * * * who shall wrongfully use, dispose of, conceal, or otherwise embezzle any money, bill, note, check, order, * * * or any other property which he shall have received for another, or for his employer, principal or bailor, or by virtue of his office, trust or employment, or which shall have been entrusted to his care, * * * upon conviction thereof * * * shall suffer imprisonment at hard labor," etc. Revised Statutes, Sec. 905.

The indictment in the instant case used the words, namely: "feloniously and wrongfully did embezzle, use and dispose of," and same are almost identical with the words and terms of the statute.

In State vs. Wolf, 34 An. 1153, it was held that "embezzlement is not a common law offence."

It is made so by our statute; and in such case an indictment is sufficient in terms, if it follows the statute substantially.

In State vs. Eames, 39 An. 986, in which the charge was that of embezzlement under Revised Statutes, Sec. 903, against the treasurer of public school funds, and the language of the indictment was that the defendant did "feloniously, wrongfully use and convert to his own use, and conceal and embezzle eight hundred dollars," etc.;

and the question raised being upon a motion to quash the indictment this court said :

“ But it is no essential that the offence should be described in the language of the statute. It is sufficient if all the elements of this offence are set forth in words of similar import to those employed in the statute; that is, in such words as clearly convey the real meaning of the language used in the statute. *State vs. Williams*, 37 An. 776; *State vs. Humphreys*, 35 An. 966; *State vs. Hood*, 6 An. 179.”

By a fair test of the indictment, under the words of the statute and in the light of the foregoing decisions, it would seem that it is good and sufficient; and that without impeaching or gainsaying anything that was said in the *O’Kean* case. But the most pertinent and applicable case is that of *State vs. Fricker*, 45 An. 647, the indictment wherein was found under the identical section of the Revised Statutes we are now considering—Sec. 905—and was drawn in quite similar language to that employed in the indictment in the instant case; and, in the course of our opinion, we said that “ the instant information is complete in its compliance with every statutory requirement.” For illustration see *State vs. Roubles*, 43 An. 200.

Counsel for the State say in their brief :

“ The lower judge has confounded the *evidence* of embezzlement with the *crime* of embezzlement itself, and virtually holds that a *demand and failure to pay over* is the *only evidence* by which the crime of embezzlement under Sec. 905 of the Revised Statutes can be established. This position is refuted by the very terms of the statute itself, which declares that a wrongful use, or concealment or disposal of, or any embezzlement otherwise shall constitute the offence.”

And with all respect for the good judgment of our learned brother of the lower court we are of the opinion that he has confounded the evidence of embezzlement with the *crime* of embezzlement itself, and in quashing the indictment has relied upon the jurisprudence applicable to the *sufficiency* of evidence to convict.

We think it clear that the ruling and decree of the trial judge were erroneous and should be set aside.

It is, therefore, ordered and decreed that the ruling and decree of the trial judge quashing and setting aside the indictment be annulled and revoked, and it is further ordered and decreed that the indict-

State vs. Green.

ment be and the same is reinstated and the cause remanded to the court below, there to be further proceeded with according to law and the views herein expressed.

46 1522
46 1421
46 1522
47 30
46 1522
113 802

No. 11,595.

STATE OF LOUISIANA VS. ADAM GREEN.*

The overt act as hostile demonstration of the deceased against the accused must be proved before the introduction of evidence as to the dangerous character of the deceased.

In passing on such a question the trial judge is vested with the discretion to decide whether a proper foundation has been laid for the introduction of evidence as to character.

A PPEAL from the Fourteenth Judicial District Court, Parish of Pointe Coupee. *Talbot, J.*

M. J. Cunningham, Attorney General, and *Alexander Hebert*, District Attorney, for Plaintiff and Appellee.

O. O. & A. Provosty for Defendant and Appellant.

The opinion of the court was delivered by

MCENERY, J. The accused was indicted for murder, convicted of manslaughter and sentenced to hard labor for a term of seven years. He appealed.

The defendant in his own behalf was interrogated as to the dangerous character of the deceased. The question was objected to by the prosecution on the ground that no foundation had been laid for the introduction of such evidence. The objection was sustained, a bill reserved, and upon this the defendant relies.

In the bill of exception a statement is made as to what fact on this point the State witnesses swore to.

The judge in a statement to the bill says: "The counsel for the accused has undertaken to relate the testimony as given in the trial, but as it differs in several material particulars from that actually delivered it is necessary to briefly state the facts on which the ruling was based." We must accept the statement of facts as made by the

This case referred to in *State vs. Beck. ante*, p. 1421.—REPORTER.

State vs. Green.

trial judge. This rule has been so often affirmed that no departure from it would be warranted. So far as the evidence of a hostile demonstration of the deceased against the accused is concerned it remains before the jury, and is a matter for their consideration in the plea of self-defence urged by the defendant.

The judge has his duties to perform in the course of the trial in determining questions of law, and his conscience and his judgment must be respected.

Whether or not a proper foundation has been laid for the introduction of evidence as to the character of the deceased is a question of law. The facts as relating generally to the defence must necessarily go to the jury for their final consideration, and among them the testimony as to the overt act or hostile demonstration. But the fact as to character, and the fact of communicated threats, must have a proper foundation laid before evidence as to them can be received. Whether these facts should go to the jury are based upon other facts which are addressed to the judgment and the conscience of the judge. Hence we have said, in two cases, *State vs. Ford*, 37 An. 443, and *State vs. Harris*, 45 An. 843, that there is a wide difference between evidence of an overt act and proof of the same, and that passing upon such a question the trial judge is from necessity clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence of an overt act, and that authority includes the discretion to ignore and not to consider testimony which his reason refuses to believe.

The material statement of the trial judge is as follows: "Some words passed between the parties, but of an immaterial and not threatening character. The deceased, who was three or four feet from the accused, took hold of the latter by the coat near the collar with one hand, when the accused shoved or pressed the deceased toward the back door of the room, through which both parties disappeared scuffling, the deceased exclaiming, that 'damned son of a bitch has stabbed me.' The witnesses state that the body was found within three or four feet of this door with a wound near the region of the heart. None of the State witnesses stated that blows had been exchanged, or that the act of the deceased in taking hold of the accused was in a hostile manner, or indicated any anger, and was not accompanied by any threats.

"The statement of the accused (as related by his counsel), which is

State vs. Spears.

substantially correct, was so contradictory as compared with that of the State witnesses that I considered it fabricated, and standing alone did not suffice to lay a proper foundation for the admission of the testimony. In fact I was strongly impressed with the opinion from the nature of the testimony that the conduct of the deceased in taking hold of the accused was rather pacific and friendly."

His statement brings this case within the rulings of the cases referred to.

The motion for a new trial only urged the defence contained in the bill.

Judgment affirmed.

Rehearing refused.

No. 11,640.

STATE VS. WILL SPEARS.

46	1524
50	94
46	1524
104	504

If a party kills another from fear of death or great bodily harm he must be free from fault in bringing on the difficulty in order to justify the homicide. In cases of mutual combat both parties are the aggressors, and if one is killed it will be manslaughter at least, unless the survivor can prove that before the mortal stroke was given he had refused any further combat and retreated as far as he could with safety, and that he killed his adversary from necessity to avoid his own destruction or greater bodily harm to him.

Where the trial judge states in his charge to the jury principles of law applicable to the facts in the case, he is not required to give an additional charge which more specifically directs the attention of the jury to the application of the law to particular facts.

A PPEAL from the Thirteenth District Court, Parish of East Feliciana. *Brame, J.*

M. J. Cunningham, Attorney General, and *J. L. Golsan*, District Attorney, for Plaintiff, Appellee.

W. F. Kernan for Defendant, Appellant.

The opinion of the court was delivered by

MCENERY, J. The accused was indicted for murder and convicted of manslaughter. He appealed.

The following bill was reserved by accused to the ruling of the trial judge:

State vs. Spears.

"Be it remembered that on the trial of this case, that it having been testified to, the accused and deceased had a quarrel at Wm. Stone's, who stopped it.

"That the deceased and the accused afterward, in going along the road, accused asked where Albert Hamilton, the deceased, was. He replied, 'Here I am.' Accused said, 'Clear the track,' and fired at deceased. That deceased got in some bushes, and the accused behind a tree. The deceased then said to accused, 'Why don't you come out square or fair like a man.' The accused said, 'All right, then you come out of the bushes.' So they both came out in the road and came toward each other, the accused still holding his pistol in his hand.

"The deceased said, 'I want to know what you have got against me.' The accused said, 'You got a bottle of whiskey from Mr. John Delee on my account when you had no right to.' The deceased said, 'I did not do it.' The accused said, 'If you will go with me to Mr. Delee's in the morning I will prove it on you.' The accused testified that he said, 'Let us go to Mr. Delee's in the morning and settle it peaceably.' The deceased said, 'No, you damned son of a bitch, we might as well, or had better, settle it now,' and put his hand to his hip pocket and tried to draw his pistol, when accused, having his pistol in his hand, shot him, from the effects of which he shortly afterward died. No witness said that deceased drew his pistol before he was shot."

The above testimony is given principally by the accused himself. In view of the above testimony accused requested the court to charge the jury, "That if the jury are satisfied from the evidence that the accused withdrew in good faith from the first conflict and sought to adjust the quarrel amicably and peaceably, and if they believe from the evidence that the deceased made a hostile demonstration to kill him or do him some great bodily harm, that the right of self-defence revived in favor of the accused, and that to protect himself from death or serious bodily harm he was justified in killing the deceased."

The court refused to give the above charge specially to the jury, for the reasons that the requested charge was too restrictive, and was calculated to confuse and mislead the jury, and that he had already charged on this point, so far as applicable to this case.

State vs. Spears.

In the general charge the judge gave the following as applicable to the facts: "But if the assaulted party is in fault he is bound to retreat as far as he can safely do so. He is required to decline the combat in good faith, and if he uses all the means in his power to escape, even killing in self-defence is lawful.

"But if a man seeks to bring on a difficulty and slays his adversary, he can not avail himself of the plea of self-defence."

In the case of State vs. Thompson, 45 An. 970, relied upon by defendant, the trial judge refused to charge the jury as to the law applicable to the facts as recited in the bill.

Analyzing the charge of the trial judge and the charge requested, they are practically the same, the latter only differing from the former in more specifically directing the jury's attention to good faith in defendant's withdrawing from the first conflict, and his belief in the imminent peril in which his life was placed, or to the great bodily harm which menaced him.

The trial judge correctly gave the law to the jury on the good faith required from defendant in withdrawing from the conflict, and the law of self-defence when the assaulted party is in fault, and the means he must employ to avoid the homicide, and the law applicable to the facts, when a person brings on a difficulty and slays his adversary. These several statements of the law in the general charge, we think, were applicable to the facts as disclosed in the bill.

If the defendant acts from the fear of death and great bodily harm and kills another, he must be free from fault in bringing on the difficulty. Law of Homicide, Kerr, 201.

In cases of mutual combat both parties are the aggressors, and if one is killed it will be manslaughter at least, unless the survivor can prove that before the mortal stroke was given he had refused any further combat and retreated as far as he could with safety, and that he killed his adversary from necessity to avoid his own destruction or great bodily harm to him. Law of Homicide, Kerr, 203; The People vs. Sullivan, 8 N. Y. 396; Hodges vs. State, 15 Ga. 117; Stewart vs. State, 1 Ohio, 66; State vs. Clements, 32 Maine, 279; Shorter vs. the People, 2 N. Y. 193; State vs. Wells, Coxe, N. J. 424; Dill vs. State, 25 Ala. N. S. 15; The State vs. Yarbrough, 1 Hawks, 78; Selfridge Case; Horrigan and T. Case of Self-Defence, 3; State vs. Chandler, 5 An. 489.

The facts recited in the bill show that the accused brought on the

first difficulty, and what transpired followed so soon after the assault of accused upon deceased that practically it was one entire transaction. The invitation of deceased to accused to come into the road and fight out the difficulty, when he was in hiding to protect himself from the assaults of the deceased, was a continuation of the conflict. Accused's acceptance of this invitation, at best, could be but a change to mutual combat. The facts stated in the bill show that the accused offered to go the next morning and prove the charge he made against the accused, and to settle the difficulty amicably. On the facts stated in the bill, the charge that the defendant was "required to decline the combat in good faith, and if he uses all the means in his power to escape, even killing in self-defence is lawful," we think sufficiently applied to the facts recited. *

The right of self-defence is a natural instinctive right in every human being and rests upon apparent reasonable necessity to preserve one's person from violence. If there be such an actual physical attack as to afford reasonable grounds to believe that the design is to destroy life or do great bodily injury upon the person assaulted, the killing in such case will be justifiable homicide in self-defence. But the accused must be without fault in having provoked the difficulty by an assault upon the deceased. What is sufficient justification to commit the homicide depends always upon the particular facts in the case and the surroundings of the parties.

We are of the opinion that the general charge embraces the law applicable to the facts in this case, and under it the jury could find, if the facts justified it, an application of the law to the theory of the defence as stated in the bill: first, that the defendant quit the combat in good faith and sought to adjust the difficulty; that the deceased made a hostile demonstration against the accused, that the right of self-defence revived in his favor and that he killed the deceased from necessity to avoid his own destruction.

The other objection to the charge, that that part of it referring to the reasonable doubt was misleading, is without merit, as the charge on this part is full and almost identical with the language in the textbooks.

The motion for a new trial urges nothing which was not before the jury and passed upon by them.

When the trial judge states in his charge to the jury principles of law applicable to the facts in the case, we are not disposed to find

Thibodaux vs. Town of Thibodaux.

fault with his rejection of a special charge requested by defendant which more specifically directs the attention of the jury to the application of the law to particular facts.

Judgment affirmed.

No. 11,657.

THEOPHILE THIBODAUX VS. TOWN OF THIBODAUX ET ALS.

An officer who acts strictly within the duties imposed upon him by law is not responsible individually for acts committed in the discharge of official duties.

When it is alleged that a municipal corporation has executed a lawful power in an injurious and malicious manner, the presumption will be in favor of the propriety and good faith of the act of the corporation, and the plaintiff must make out a clear case of wilful oppression to obtain relief.

A municipal corporation is not liable for damages done to private property, unless the act was done without authority of law, or, being authorized by law, was improperly and wantonly executed.

A PPEAL from the Eighteenth District Court, Parish of Lafourche.
Billiu, J. ad hoc.

Clay Knobloch & Son for Plaintiff, Appellant.

Beattie & Beattie for Defendants, Appellees.

The opinion of the court was delivered by

MCENERY, J. The plaintiff owns property upon which he resides in the town of Thibodaux. He sued the corporation and John McCulla jointly and severally for two thousand five hundred dollars damages for depreciation in the value of his property and two hundred and fifty dollars attorney's fees for prosecuting the action. The cause of action is stated to be that on the 6th day of May, 1890, the defendant corporation allowed John McCulla to cut a canal from Acadia plantation to drain all the territory, including the property of the defendant McCulla to the westward, into and through a ditch on Cider street in said town, on the south line of plaintiff's property, into the Barataria canal, which is immediately west of plaintiff's property.

The territory drained is alleged to be four hundred acres, the

Thibodaux vs. Town of Thibodaux.

natural drainage of which, it is claimed, is to the east through Acadia plantation and through the Lafourche swamp.

The plaintiff further alleges that he made complaint of the precipitation of the water on his property, but instead of stopping it the corporation, on the 1st April, 1898, aggravated the damage by placing a floodgate at the west end of said culvert. The acts of defendants are alleged to be "tortious and illegal." The defendant McCulla pleaded a general denial, and specially that "in all he did in the premises was in his official capacity as drainage commissioner." The defendant corporation also pleaded a general denial, and admitted its consent to the drainage complained of.

The testimony shows that the defendant McCulla acted solely in his official capacity.

The record does not disclose the fact that the defendant McCulla acted on his own responsibility and individually in cutting the ditch.

Officials in the performance of a duty imposed by law can not be held in damages for acts done strictly within the lines of official duty.

The evidence shows that the second drainage district was created by the police jury of Lafourche and embraced within its jurisdiction the town of Thibodaux.

There are three commissioners of the drainage district, and on their application permission was granted by the council of the town of Thibodaux to drain into Cider street ditch a canal. This ditch or canal was cut by Guidry and Lagarde, then owners of plaintiff's property. Plaintiff acquired title from Guidry. The ditch was cut many years ago and drains into the Barataria canal, which is the natural drain of the town of Thibodaux and had been used to carry off the drainage of the town from time immemorial. Plaintiff's property is lower than the land immediately alongside of the ditch and between that ditch and his fence, and when the ditch is dry water to a considerable amount after heavy rains remains on the ground in the vicinity until evaporated. Before the ditch on Cider street was cut by Guidry, he says plaintiff's property, after heavy rains, was full of water, in depth not less than a foot and a half. The lots of plaintiff sloped toward the east.

The natural flow of the water is from a ridge on Tetreau's land, or in that neighborhood, to the east on the east side of the ridge, and to the west on the west side of it.

The Cider street ditch is the main drain that carries the water into

Bradford vs. Damare.

the Barataria canal from the eastern part of the town and the suburbs in the vicinity. If there was no ditch on Cider street the lower portion of the town would be flooded in times of heavy rainfalls. A flood-gate was placed at the culvert on the Cider street ditch, the object of which was to prevent the water from the Barataria canal running through that culvert and going east.

It appears to us that all that was done in opening, deepening and widening the Cider street ditch was for the better drainage of the town. The plaintiff's land was low and so situated as to receive the drainage from parts more advantageously located.

The plaintiff has apparently suffered from the drainage canal on Cider street. But the inconvenience to him is the result of the unfortunate location of his property. He holds it subject to unfortunate conditions and his interest must give way to the greater controlling interest of the public. *Dubose vs. Levee Commissioners*, 11 An. 167.

It is probable that the culvert in the ditch was too small. But this was an error of judgment in the construction of the work. But on this point the evidence is not such as to justify the conclusion that the work was defective. When it is alleged that a municipal corporation has executed a lawful power in an injurious and malicious manner the presumption will be in favor of the propriety and good faith of the acts of the corporation, and the complainant must make out a clear case of wilful oppression to obtain relief. *Reynolds vs. Mayor*, 13 An. 428.

The acts of the corporation of the town of Thibodaux have not been shown to be such acts as were not vested in the corporation by the charter of the town, or that they were improperly, wantonly and maliciously done. We are therefore of opinion that the plaintiff is without cause of action against the defendants. *Bennett vs. New Orleans*, 14 An. 120.

Judgment affirmed.

No. 11,647.

JAMES L. BRADFORD VS. GERMAIN DAMARE; JAMES L. BRADFORD
VS. OSCAR RICHARD; JAMES L. BRADFORD VS. GEORGE VIG-
NEAU.

The purchaser of property is presumed to acquire all actions appurtenant to the property and necessary to its perfect enjoyment, but damages suffered by the

46 1530
110 606
46 1530
118 439

Bradford vs. Damare.

vendor before the sale are personal to him and are not transferred, and can not be recovered by the purchaser unless expressly transferred. Mention must be made of the right of action and by whom the damage was done, and against whom the action must be directed.

A PPEAL from the Fourteenth District Court, Parish of Iberville.
Talbot, J.

James L. Bradford, Plaintiff and Appellant, *in propria persona*.

Sims & Gondran for Defendants, Appellees.

The opinion of the court was delivered by

McENERY, J. These cases were consolidated, tried together and one judgment rendered applicable to all. Plaintiff's demands against defendants were dismissed.

The plaintiff purchased from the Pontchartrain Levee District a large amount of swamp land. The sale was made May 1, 1894. The price was one dollar per acre, and the land conveyed, situated in Iberville parish, was two thousand one hundred and seventy-nine and 92-100 acres.

In the petition in the suit against Damare, it is alleged in the months of June, July or August, in 1893, during a period of overflow, he cut from said land a large number of cypress trees, and made the same into boards and shingles, staves and wood. The petition alleges that said staves now are, and always have been, the sole, lawful property of your petitioner, and that he is entitled to recover possession of the same, or the value thereof, with full damages for their conversion.

The suit against Vigneau and Richard, both of whom, it is charged, received from the defendant, Damare, staves, is for their unlawful detention and refusal to deliver the same to petitioner. In these suits writs of sequestration were issued, except as against Richard, and the property seized. It was released on bond by defendants.

The defendants filed an exception of no cause of action, which was overruled, after which the defendants filed answers reiterating their exception and a general denial. Subsequently and prior to the trial, peremptory exceptions were filed, to the effect that should it be held that the act of sale carried with it the right to sue for the

Bradford vs. Damare.

alleged trespass and torts of defendants, that the sale was of a litigious right, and therefore null and void. This was referred to the merits, and on the trial of the case the demand of plaintiff was rejected in each of the three suits, the sequestration against Damare and Vigneau was set aside, one hundred dollars damages for attorney's fees in favor of Damare for the setting aside of the sequestration, and for the same reason fifty dollars in favor of Vigneau. Material evidence, necessary to support plaintiff's demand, was rejected, and the judgment was based on failure of proof on part of plaintiff.

The plaintiff bases his right to pursue the defendants on the recital in the deed to him as follows: "With full substitution and subrogation in and to all the rights and actions of warranty which said board has or may have against all preceding owners and vendors and to all other rights and actions against all other persons;" and to a supplemental deed to him, *after* the filing of this suit by the Pontchartrain Levee Board, in which it is alleged that in the sale to plaintiff the board intended to transfer to him "every right of action or recourse in favor of said Bradford which said Board of Commissioners or its vendors had or might have to proceed against any and all the trespassers or other persons for trespassing upon, or advising, aiding or abetting others in trespassing upon, or cutting, or removing, or purchasing, or otherwise interfering with the timber and trees, being or growing upon said land." This supplemental deed or declaration of the intention of the parties to the original deed was rejected by the court. It will not be necessary to rule on the question of its rejection, for if the defendant's exception of no cause of action, which was directed to the recital in the original deed, is good, it applies equally to the recitals in the supplemental deed, as it is equally as ambiguous and fails to expressly describe or indicate what particular right of action was transferred to plaintiff.

This court has said in several cases "that the purchaser of property is presumed to acquire all actions appurtenant to the property and necessary to its perfect enjoyment; but as to damages actually suffered by the vendor before the sales they are personal to him and can not be recovered by the purchaser without an express subrogation." *Clark vs. Warner*, 6 An. 408; *Payne, Jr., vs. James & Trager*, 42 An. 234; *Matthews vs. Alsworth*, 45 An. 466.

If the plaintiff rests his demand upon the substitution in the act of

Bradford vs. Damare.

sale to him he is confronted by Art. 2160, par. 1, C. C., which says in reference to a conventional substitution: "When the creditor receiving his payment from a third person subrogates him in his rights, actions, privileges and mortgages against the debtor, this subrogation must be expressed and made at the same time of the payment."

In the act of sale to plaintiff there is no mention of his having paid the debt due by these defendants to his vendor, and there is no express subrogation made at the time of payment. If the act subrogated the plaintiff, as claimed in the petition, the price paid for the property should have some reference to the claim which the plaintiff paid, and was included in the price.

In the case of *Clark vs. Warner*, 6 An. 408, this court said: "But as to damages actually suffered before the purchase we know of no other principles governing the case than those referable to this general principle of the Code, that 'every act of man that causes damages to another obliges him by whose fault it happened to repair it.' It is a mere corollary that the reparation must be made to him who suffered the injury. The plaintiff, after possessing the property twenty months, claims one-third more damages than he gave Mrs. Springer for his lot with all the buildings and improvements. This leads to the impression that the modicity of the price he gave for the premises may perhaps be attributed to their dilapidated and dangerous situation on account of the erection of the ice house and other causes. It is impossible from the law to concur with the District Judge that these damages, which probably caused the moderate price given for the house and kitchen, should be a source of profit to the purchaser, who had a perfect knowledge of their existence when he purchased."

This case in the facts is not unlike the case under consideration.

The plaintiff paid two thousand one hundred and seventy-nine dollars and ninety-two cents for the land, and his demand is for six thousand and eighty dollars for the timber cut and damages in cutting and opening float roads. In the act of sale 1st of May, 1894, the plaintiff acknowledges himself to be familiar with the title. The almost immediate filing of this suit after the purchase shows that plaintiff was familiar also with the condition of the land at the time he purchased the same. If the price of one dollar per acre is to be considered as a low price for the land, it is to be presumed that the

Bradford vs. Damare.

taking off the timber and other damages were estimated in fixing the price, and we can not believe that the price was so fixed in order to permit the plaintiff to reap a rich reward in the way of profits for damages and loss of timber prior to the sale. If so, the specific claim transferred would have been mentioned.

In the act of subrogation, an express mention of the amount of damage done, and its payment by the plaintiff, either in estimating the price or separately, was necessary to constitute a conventional subrogation.

In *Matthews vs. Alsworth* the syllabus is as follows:

"The purchaser is presumed to buy the accessory rights to the property transferred, but damages suffered by the vendor before the sale are a personal right not transferred and can not be recovered without an express subrogation."

In that case a plantation was sold, and with it a lease entered into October, 1890. The deed contained this stipulation: "This conveyance is made with complete transfer and subrogation of all rights and of all actions of warranty or otherwise against all former claimants, proprietors, tenants or warrantors of the property herein conveyed." Under this stipulation the court held that the language could not be construed to include the right of action for a violation of the lease by any tenant prior to 1st of October, 1890. In reference to the violation of the lease prior to 1890, the court said: "They are not distinctively alleged, particularly as to dates." The conclusion from the opinion is that unless there was particular mention of the lease for the violation of which damages were claimed, no right of action for the violation was transferred. There was no express subrogation.

In *Roman vs. Forstall*, 11 An. 717, this court said that *subrogation* and *transfer* are not synonymous legal terms. Payment is a mode of extinguishing a debt; subrogation is a fiction of the law, which in the language of the Code "is the right of a creditor in favor of a third person who pays him," and is "either conventional or legal."

The cases referred to seem to treat the transactions alluded to as transfers, although the word subrogation is sometimes employed.

Considering the transaction of the Board of the Pontchartrain Levee District with plaintiff as a sale of the right of action "to proceed against any and all the trespassers or other persons for trespassing upon, or entering, or advising, or abetting others in tres-

Mattise vs. Ice Company.

passing upon, or cutting, removing or purchasing, or otherwise interfering with the timber or trees, etc., being or growing upon said land," there is no definite thing conveyed or transferred. No right of action against any particular person, for any particular kind of trespass, is transferred.

The rights of action transferred to plaintiff were independent of any accessory right accompanying the property sold. There was no price stipulated in the act of sale for them. II. Hennen, Sale, 1 (d); Civil Code, 2439; Collins vs. Lottery Company, 43 An. 9.

Incorporeal things, such as a debt, an inheritance, a servitude or any other right, may be sold, but there must be some mention or description of the thing or the right sold, so as to identify it with some degree of certainty.

The plaintiff's principal demand against the defendants is for the timber which had been taken off the land. This timber was not transferred by the sale to plaintiff. No mention is made of it. In Woodruff vs. Roberts, 4 An. 127, it was held that where one purchased from the government a certain number of acres of public land, on which there was at the time wood cut and corded, he has no claim to the wood. The rights of the government to it were not transferred to the purchaser.

The defendants have asked for an amendment of the judgment increasing the amount of damage for attorney's fees. The District Judge who tried the case was in a position to know the value of the services of the attorneys. There is nothing in the record that suggests to us that he erred in fixing the amount.

Judgment affirmed.

No. 11,507.

JOHN JACOB MATTISE VS. CONSUMERS' ICE MANUFACTURING
COMPANY.

The death of plaintiff's son was caused by the explosion of one of defendant's boilers.

There was mismanagement and negligence in operating the machinery and boilers. The man killed was a coal passer at the boilers.

The plaintiff claims for the recovery of damages sustained; for agony and suffering endured by the victim of the accident.

There is a distinction between servants of a corporation exercising no supervision over others engaged with them in the same employment and employes clothed with the control of a department, with authority to employ and discharge the servants of the master.

46 1535
51 115

46 1535
52 1114

46 1535
104 482

46 1535
111 580

46 1535
114 1073

46 1535
116 470

46 1535
125 1092

Mattise vs. Ice Company.

The servant is supposed to know and assume the risk of his fellow servant's carelessness and negligence; but he does not risk the carelessness and negligence of those placed over him.

He acts in a subordinate capacity. His duty is obedience. He relies on the care and judgment of his superiors.

A corporation is liable for negligence respecting duties it is required to perform as master.

The agent entrusted with their performance occupies the place of the corporation, deemed present.

The engineer in charge of the machinery and of the ammonia department of the plant was informed of a "bag" formed on the shell of the boiler, that exploded three hours after he had been informed.

The boiler was not "cut off" and put out of service as required to avert accidents

A PPEAL from Civil District Court, Parish of Orleans.
Monroe, J.

John Q. Flynn and W. B. Lancaster for Plaintiff and Appellee.

Harry H. Hall for Defendant and Appellant.

The opinion of the court was delivered by

BREAU, J. The plaintiff sues for the recovery of damages sustained by the death of his son caused by the explosion of a boiler.

The defendant admits that Frederick Mattise, the son of plaintiff, was killed by an explosion of a boiler owned by the company.

The defence is a denial of all liability, and that it, or its employés, were guilty of negligence; and it further alleges that if there was negligence, its employés were the fellow servants of the defendant.

In a supplemental answer, the defendant sets up and avers that plaintiff proposed, if the defendant would pay the funeral charges he would accept the payment in full settlement of all claims that he might have for damages.

The court *a qua* decided that the plaintiff is not entitled to recover on his own account for loss of support, as the relations between himself and his son had not been of a character to justify the belief that he would have looked to or received from him any relief or support, had he lived.

Upon the other ground, as exercising the action of his son, which survived in his favor, he was allowed the sum of two thousand five hundred dollars.

The following are the facts as we summarize them:

The boilers were iron boilers.

In the afternoon of 25th of June, 1892, the fireman informed the engineer in charge that a "bag" had formed on the boiler.

The chief engineer testifies that he ordered this fireman to put out the fires and put the boiler out of service.

He also states that the boiler had "bagged" previously; upon notification he gave it a critical examination and put it into service for inspection; that it is customary whenever a boiler "bags" to put out the fire; to have it examined and the "bag" driven up or cut out and a new sheet put in. A bag in the boiler is formed by sediment settling on the inside, which prevents the water from touching the shell; the result is the boiler expands wherever the sediment settles, and the entire thickness of the sheet is forced out by the inward pressure. The weight of the evidence is that a "bag" in a boiler should never be neglected, as neglect may be attended with serious accident; that the fire should be immediately taken out and the boiler disconnected. About three hours after the fireman had reported to the engineer and superintendent in charge that there was a "bag" in the boiler, the explosion occurred and killed the son of plaintiff, who was a coal passer at the boilers. The evidence does not disclose that the fireman complied with the order and that the boiler was "cut off" or separated from the battery of boilers of which it formed part by closing the connecting valves and putting out the fire.

The chief engineer, Smith, superintended and directed the ammonia department of the plant and had charge of the whole factory. He had the authority to employ and discharge the fireman and other employes.

The deceased was his subordinate under his immediate direction, by whom he had been employed and might be discharged.

The president of the company testifies that a superintendent of the defendant's ammonia engine and boiler was succeeded by this engineer, who was promoted from the position of second to that of chief engineer.

As to the defendant's payment of the funeral expenses the president, as a witness, says that an aunt of the decedent called on him and said the plaintiff was in Covington and asked him if he would pay the funeral expenses, and that if he did they would require noth-

Mattise vs. Ice Company.

ing more. The company did defray the expenses of the funeral. The testimony does not establish that any agreement was entered into of compromise regarding damages.

We will discuss the issues raised in the order in which we have stated the facts of the case.

THE NEGLIGENCE CHARGED.

It is evident that had the steam been "cut off" by closing the valves and thereby separating the boiler that exploded from the other five of the battery, the explosion would not have taken place.

After those hours a boiler out of service will not explode.

There is evidence tracing the explosion to the "bag." A witness, a boiler maker, whose testimony is not contradicted on that point, was satisfied that the "bag" was the cause.

The negligence in not extinguishing the fire and disconnecting the steam is not less because an unexecuted order is said to have been given to the fireman. Empty orders will not suffice.

It was the duty of the engineer, as he had done on previous occasions, to examine the boilers and exert due precaution against an accident.

It was not shown that the engineer's authority, which was really that of a superintendent, was at all felt.

He controlled the labor, or at any rate it devolved upon him to control the labor in the departments under his charge (in fact of the whole plant).

The judge of the District Court, who heard the witnesses, says:

"A 'bag,' that is to say a local distention, took place in one of the boilers and about three hours later the boiler exploded.

"That Smith, the engineer in charge, was informed of the 'bag' at the time that it appeared and had ample opportunity to have had the boiler cut out, that is to say disconnected from the other boilers and relieved of steam, and to have had the fires drawn from under it, and that it was his duty after having been informed of the 'bag' to have immediately taken those measures of precaution.

"That whilst said Smith claims to have given orders to Fricke the fireman to extinguish the fire and put the boilers in question out of service, it does not appear that he saw that his orders were executed, or as a matter of fact that said orders were executed, but it appears on the contrary that the boiler which exploded three hours after the

Mattise vs. Ice Company.

'bag' was the boiler in which the 'bagging' had taken place, and my conclusions not only from direct testimony to that effect, but from evidence as to the nature of a 'bag' and as to the surrounding circumstances is that the 'bag' in question was the point from which the break in the boiler began when the explosion took place and that said 'bag' was the immediate cause of the explosion."

THE DECEDENT AND THE CHIEF ENGINEER IN CHARGE OF THE
FACTORY WERE NOT FELLOW SERVANTS.

The defendant's second ground is urged in the alternative; that is, if there was any negligence the employés were the fellow servants of the decedent and that the company can not be held liable therefor.

Distinction may well be made in case of corporations from that of individuals. Corporations must necessarily act through agents, who may be regarded as the representative of the corporation when acting within the scope of their authority.

It must be borne in mind that the decedent was performing his duty as a servant under the direction of a superior; it was incumbent upon him to obey. It was not right in the agent to render the service dangerous by his negligence. The employé had a right to assume that his superior would exercise proper care.

The company had given to the employer of the decedent ample authority.

He states as a witness, and his statement is not contradicted: "The company gave me full power to act and I used every precaution to prevent accident."

Having been placed in this position of trust he may fairly be considered as the representative of the corporation in operating the factory and in all acts needful to the protection of the company's servants.

In superintending the coal passer's work and that of the fireman, he was not their fellow servant.

Thus authorized he was bound to exert such intelligence, skill and experience as is to be required from one to whom the safety of others is intrusted. *Darrigan vs. New York & New Eng. R. R. Co.*, 52 Conn. 305.

This court has adopted the decision of *C., M. & St. P. R. R. Co. vs. Ross*, 112 U. S. 377, in which the doctrine is announced "that a conductor having the entire control and management of a railway

Mattise vs. Ice Company.

train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is, in fact, and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will ensure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part and prompt and unhesitating obedience to his orders."

In that case the court also holds that "whenever a train or engine is run without a conductor, the engineman thereof will also be regarded as conductor, and will act accordingly. The argument is a short one. The conductor of a train represents the company, and is not a fellow servant with his subordinates on the train."

When applied to the case at bar, we find analogy in that the engineer had charge of the ice factory, and that the fireman had charge of the boilers and the pumps in the boiler room, and that he was under the direction and superintendence of the chief engineer, who represented the company in operating the factory.

It is not the mere fact that the chief engineer had control over the fireman and the coal passer that destroys the relation of fellow servants, between him and the servants, but the additional fact that he succeeded the superintendent and vice principal, George Smith; that he had full authority to provide for the safety of the servants and had the management of the factory, and in view of the further fact that it is the duty of the master to supply machinery and tools and to see to their repair, and that they are kept in good repair.

When it was discovered that the boiler was out of repair and out of condition, it became the duty of the master, and in his absence of the vice principal, the chief engineer in charge of the factory, to attend to its repair and restore it to a safe condition.

The case from which we have quoted was cited with approval in 112 U. S. 377, in *Towns vs. Railroad Company*, 37 An. 630.

In *Van Amburg vs. R. R. Co.*, *id.*, p. 655, this court said: "The defence that no recovery can be had because, even admitting that the fault lies with the conductor, his act was that of a fellow servant, is no longer tenable to the extent formerly admitted. * * * The case 112 U. S. 377, has made an inroad on jurisprudence in the right direction."

Mattise vs. Ice Company.

Our examination of the authorities enables us, we think, to quote the following as a correct statement by Bailey in his work entitled "Master's Liability for Injuries to Servants," without consulting this court to the full extent of the principles of the decision to which allusion is made:

"In the Federal courts, the courts of New York, Wisconsin, Maine and many others, the doctrine is that the master is *personally present all the time*, even in the performance of actual labor; while in Massachusetts and some other States the extreme is not held in the case of corporations, but rather when the master has used due care in the first instance, and provided suitable and reasonably safe appliances, and provided suitable means for keeping and maintaining them in proper repair and employed competent servants to see that the means were properly used, it had fulfilled its duty."

We hold to the rule laid down by the first courts referred to, that is the Federal and other courts, to this extent only.

That the knowledge of the vice principal, who is present, that machinery was dangerously defective is the knowledge of the principal.

The one in charge of a factory should be bound to guard against threatening accidents.

Business enterprises extend beyond a continent and at great distances from the domicile of the owners securely managed by faithful agents and skilled men. Their knowledge that the use of machinery is unsafe is notice to the owner.

THERE WAS NO COMPROMISE FOR ANY CLAIM FOR DAMAGES.

Finally the defence urges:

If there was negligence, that the company's payment of the funeral expenses was accepted by the plaintiff in satisfaction for all claims.

The conversation by the father of the deceased and the president of the company falls far short of a compromise or of any understanding respecting any claim for damages.

There was nothing said regarding the accident and damages.

The testimony of other witnesses does not establish an abandonment of any claim, so as to bind the father and plaintiff.

He may have expressed himself as satisfied with the company's generosity in paying the expenses; his utterances have not the effect

Mattise vs. Ice Company.

of preventing him from recovering a right in regard to which it does not seem he knew anything.

The fact that the company paid the funeral expenses of its late servant reflects to its credit and should not prejudice the rights of plaintiff or defendant.

DAMAGES.

As to the *quantum* of damages, the plaintiff is only entitled to such damages as the deceased himself could have recovered at the moment when he died; that is, compensation for the suffering he endured.

It is not possible to determine with great precision the amount of damages that should be allowed for such suffering.

In the case of Poirier vs. Carroll, 35 An. 699, they were limited to twenty-five hundred dollars. The deceased had suffered about twenty-four hours.

In Van Amburg vs. R. R. Co., 37 An. 655, the court said: "The death was immediate if not instantaneous. No arithmetical calculation can compute the intensity of that agony that overwhelms the victim of such an accident when he confronts death, but a sum has been adopted and its apportionment is not determined by fixed rules."

The judgment of the District Court was reduced to eighteen hundred dollars.

In the case of Towns vs. R. R. Co., 37 An. 636, the sufferings were endured about four hours before death; the amount of one thousand dollars was allowed as damages.

In this case the sufferings were about twelve hours.

We think the amount allowed should be reduced to one thousand dollars.

It is therefore ordered that the judgment appealed from be amended by reducing the same to one thousand dollars and legal interest from the date of the judgment of the District Court, and that as amended the same be affirmed, appellee paying the costs of appeal.

Rehearing refused.

McGuire et al. vs. Railroad Co.

No. 11,571.

THOMAS MCGUIRE ET AL. VS. THE VICKSBURG, SHREVEPORT &
PACIFIC RAILROAD COMPANY.

In an action for damages against a railroad company by the surviving parents for the loss of their son run over and killed by the locomotive, the defence of contributory negligence will not avail, if by reasonable care on the part of those in charge of the train the accident could have been avoided. 2 Thompson on Negligence, 1105, 1108; Patterson's Railway Accident Law, 51, 55; 144 U. S. Reports, 429.

The obligation of reasonable care to avoid accidents on railroads tracks running through cities rests on the railroad companies, although the tracks are laid on an embankment the property of the company. Pierce on Railroads, 330; 1 Thompson on Negligence, 449.

A PPEAL from Fifth District Court, Parish of Ouachita.
Richardson, J.

Gunby & Sholars for Plaintiffs, Appellees.

Stubbs & Russell for Defendant, Appellant.

The opinion of the court was delivered by

MILLER, J. The plaintiffs, parents of Lee McGuire, deceased, sue for damages caused by his death under the wheels of defendant's locomotive while pulling a train of cars on the night of the 24th October, 1892, from the passenger to the freight depot of defendant in the city of Monroe. The petition charges the engine of the defendant was in bad condition, the steam escaping from the giving way of studs in the steam chest, so as to conceal from the engineer any object on the track and render useless the headlight; that the deceased walking on or near the track of the road was startled by the near approach of the engine, and in his effort to get out of the way stumbled and fell on the track, where he was not seen by the engineer until the train was upon him; that, dragged under the wheels, the engine passed over both legs, from which death resulted. The petition charges the tracks on which deceased was killed pass through the heart of the city, on an embankment persons were accustomed to walk upon; that but for the escaping steam preventing the engineer's view of the tracks he would have seen the deceased in ample time to have avoided running over him, and the petition

46 1543
49 1316

46 1543
51 114
51 115
51 1694

46 1543
452 422
452 1082
52 1901

46 1543
105 427

46 1543
106 113

46 1543
111 702

46 1543
112 946
114 1079

46 1543
115 600

46 1543
117 327

46 1543
1121 47

46 1543
q123 652
1124 171

McGuire et al. vs. Railroad Co.

negating any imprudence on the part of the deceased, charges his death was caused solely by the gross carelessness of the defendant's agents. The petition claims fifty thousand dollars damages for the pain and suffering of the deceased, surviving his injuries nine hours, and for the injury to plaintiffs for the deprivation of their son, on whom they depended for support.

The answer avers the proper equipment; good condition of the engine and the competency of the engineer; that the engine was in a down grade from the passenger to the freight depot, and not working any steam at the time of the accident; that the deceased was intoxicated, in that condition was on defendant's tracks, if not between the rails, alongside or near the tracks; that the tracks are laid on defendant's private property; that thus a trespasser, the deceased, whether accidentally or intentionally, fell on the tracks in such close proximity to the engine as to render it impossible for the most skilful engineer to avoid the accident.

The answer further avers the deceased was addicted to drink, and when drunk was reckless; on other occasions had placed himself before the engine, and was saved only from death by the interposition of others, and, denying any neglect on the part of defendant's agents, the answer charges the death was due solely to the recklessness of the deceased.

After answering, the defendant excepted that the petition disclosed no cause of action, which, after argument, was overruled by the court.

There have been two trials of this suit in the lower court before juries. The first verdict was for twenty thousand dollars. The jury on the second trial by a majority repeated the verdict. From the judgment, after the ineffective effort for a new trial, the defendant prosecutes this appeal.

The exception of no cause of action directs attention to the allegations in the petition relied on in defendant's brief:

"That on said night Thos. Lee McGuire was walking on or near the track of said road, when he was startled by the near approach of said engine, and in his efforts to get out of the way stumbled and fell upon said track, where he was not seen by the engineer until the engine was upon him, which dragged him under the wheels and passed over both his legs near the body; and that the conduct of deceased in walking along a well-beaten path

was neither imprudent nor rash; that the right eye of deceased had been injured by an operation so as to practically destroy its sight."

It is insisted by defendant that in thus stating his case, the plaintiffs have excluded their claim for relief. Along with these particular allegations the petition avers that the engine of the defendant was in such a condition as made it dangerous to life; that if the head-light had not been obscured by the escaping steam the engineer would have perceived deceased in ample time to have stopped the engine and saved the life of the deceased, but did not see him until the engine was upon his body, which dragged under the wheels; that he was carried some distance from where first struck; and in the strongest language, the petition attributes the accident to the carelessness of defendants. In view of all the allegations admitted for the purpose of the exception, we can not hold the petition states no case. The particular allegations on which the exception is based, even if isolated, do not relieve defendants from responsibility. Whether the engineer gave proper signals before the engine came upon deceased; whether he could or should have been perceived in time to save his life; whether the defendants could with proper care have averted the killing, are, we think, left in issue to be solved by the testimony. In our opinion, therefore, the exception was properly overruled.

It appears that soon after the train left Shreveport on the east-bound trip, three of the studs of the steam chest gave way, causing a leakage of steam, obscuring the track ahead. The track was obscured, testifies the engineer, according to the speed of the train; if running fast the draft would blow the steam down so he could see over it. When running fast or working no steam there was nothing to obscure the track. The testimony of the conductor and brakeman is that nothing could be seen on the track, the conductor stating the steam blinded him. The accident was deemed of sufficient importance to telegraph the master mechanic the full train could not be rendered, but the running of the locomotive clouding the track seems to have suggested no danger to life, except to increase the watchfulness of the engineer. In this condition, with the defective engine forming a curtain between the engineer and the track, the train reached Monroe. It is claimed that in pulling the train between the passenger and freight depots in that city, during which the deceased was run over, there was no escaping steam. On this point

McGuire et al. vs. Railroad Co.

the testimony is conflicting. But the engineer testifies steam was worked for about one hundred and fifty yards. On starting, the engine was at Third street and the deceased was run over between Fourth and Fifth streets.

The train reached Monroe at night and the accident occurred at 9 o'clock that night, while the train as stated was being pulled between the two depots. The tracks crossing the river at Monroe are laid on an embankment, called by the witnesses the right of way purchased by the company. The tracks are not enclosed. There are a number of streets leading to or intersecting the embankment. There is a pathway at its base, one along either side and another between the tracks on top of the embankment. Persons coming to the embankment, on the streets that lead to it, use the paths on the embankment and walk on the tracks affording, the testimony is, the shortest way to the river and other localities. Among the intersecting streets are Second, Third, Fourth, Fifth and Sixth. We think it shown that the deceased walked on Fourth street till he reached and went on the tracks. He met his death between Fourth and Fifth streets.

The train on the night in question consisted of eleven freight cars, the usual number being larger, more being declined because of the leaking chest. There was besides the usual caboose car in the rear. The train stopped at the passenger depot, near Second street, to land a passenger. With the caboose, stopped at the depot, the engine stood at the Third street crossing. From that point it moved on its course to the freight depot or yards, which we infer are about the Sixth street crossing. The testimony is that steam used only sufficient to start the train gave an impetus sufficient on the down grade to roll the train into the yards. The movement of the train was very slow, four or five miles an hour is the engineer's testimony, and other witnesses testify about as fast as a man's walk. With this slow motion the night was clear; the headlight, trimmed and burning, was sufficient to show objects on the track one hundred and fifty to two hundred feet ahead, and it is shown conclusively the train could have been brought to a complete standstill within a very short time, within one hundred and fifty feet states one, others name a shorter distance; but all discussion on that point is obviated by the fact the train was stopped within sixty feet from the time the brakes were applied. But it is in proof the signal for the brakes was not given, nor any whistle

sounded to announce the approaching train until the deceased was almost under the wheels of the locomotive and his death inevitable. The engineer says he saw an object, but very close, and could not tell what it was, immediately called for brakes, reversed engine and gave steam to assist in stopping, but it was too late. The brakeman, standing on the steps of the tender and looking ahead preparing to get down and open the switch, testifies: The engineer told witness to get off the steps, that he wanted to see what he had struck, and the witness got down, looked under the engine and told the engineer it was a man. The other brakeman and the conductor testify the first intimation they had of the disaster was the jar of the train and the whistle announcing the accident. The deceased was run over at the point indicated by the witnesses as opposite the Voss house, which is about the centre of the square between Fourth and Fifth streets, say a square and a half from the depot.

There the deceased was first struck by the locomotive. There the whistles were sounded, not to give warning of the advancing trains but to summon the conductor and others to the scene. From where the deceased was struck and the brakes applied he was borne the sixty feet, within which the train was stopped, and for that space his bones, blood and flesh laid on the track attesting the different result if the train had been arrested before that space had been reached. It is in proof the engineer remarked he saw nothing until he felt something under the engine. He testifies he remembers no such remark; that after entering the curve after crossing Fourth street he looked back to see if all the cars were coming, and if any signal was given; on looking again at the track saw an object, don't know how far but very close, and could not tell what it was, immediately called for brakes, reversed the engine and gave steam to back; that the interval between looking back and then ahead was very short, and it seemed to him if there had been an obstruction on the track before he looked back he would have seen it; nothing, he adds, could have prevented his discovering it, i. e., if it had been there. It is in proof, too, that the deceased, on being drawn from under the engine, said, answering questions, there was no one to blame but himself and whiskey. In his condition, suffering intense pain and under the influence of liquor besides, we can not appreciate that either before or after he was competent to form any opinion on the question of responsibility. He knew he was drunk and injured

McGuire et al. vs. Railroad Co.

on the track and his statement adds nothing to the facts or their probative force.

The engineer's report, made on the night of the occurrence, is that the motion of the train was four miles an hour; that it was the fault of the deceased, intoxicated and lying on the track, and that the train was stopped within thirty feet. It seems to us the necessary conclusion from all the testimony is that the deceased was not seen nor any effort made to stop the train until the locomotive was upon him, or so near as to make no appreciable difference. It leaves to us the question whether the deceased should not have been perceived, and whether the train could not, with reasonable caution, have been stopped in time to save his life. When taken from under the engine the head and body of deceased was between the tracks, his legs crushed close to the body. For about nine hours he suffered great pain from his injuries, and died from their effect.

The suit is by the parents of the deceased, to whom the law gives the action for damages. Civil Code, Art. 2315; Act of 1884, p. 94. We are asked by defendant to refer the killing of the deceased by this slow moving train, with its bright headlight and on a clear night, entirely to his fault, and hold the defendant free from all negligence. With great earnestness it is pressed on us the embankment was private property, and the deceased a trespasser on it. But the testimony is the embankment running through the city with several intersecting streets was commonly used by pedestrians. As one of the witnesses expresses it, the embankment for walking was preferred to the pathway, often muddy at its base. It is brought to our notice, too, that on other occasions deceased had exhibited recklessness of danger; had laid on the track in front of an approaching train; at other times had jumped on the foot-board of the switch engine to ride through Monroe, and on yet another occasion had avowed his purpose to jump in the river. Along with this line of testimony there is that tending to show that a person, unperceived by the engineer, could get on the pilot in front of the engine. There is in defendant's answer the suggestion of suicide. We are not at liberty to accept this theory. Self-destruction is not presumed, or much weight due to threats of suicide inspired perhaps by drink, nor is greater importance to be attached to acts of bravado or temerity on other occasions, as denoting the purpose of deceased to throw himself before this train.

It is in proof that the deceased had been drinking, and was intoxicated on the night of the accident, and in that condition went to the embankment. It is urged by defendant that the deceased fell or put himself on the tracks so suddenly as to afford no time to stop the train. To this contention we have given careful attention. Found on the tracks between Fourth and Fifth streets, we think it shows that he reached the embankment by following Fourth street, on which were the saloons in which he had been drinking. If he had been lying on the tracks when the train began its movement from Third street, considering the slow motion, the good headlight and the quickness within which the train could have been stopped, he must, with ordinary attention of those in charge of the train, have been seen and the train arrested in time to avoid the accident. This conclusion seems to us inevitable, giving effect to all the testimony, in part coming from the engineer himself, especially as to the capacity of the headlight to show objects ahead. Nor do we understand the defendant's argument to question the illuminating capacity of the headlight, nor the slow motion of the train, or the ease with which it could have been stopped. The contention mainly relied on by defendants is the sudden falling of deceased before the engine. Defendants rely largely on the testimony of a witness, a railroad employé, produced on the second trial. He was subjected to a rigid cross-examination, and the fact that he was not brought forward for more than a year after the accident is the subject of some comment. His testimony is, the deceased was standing on the corner of Fourth street and the embankment, went staggering down the track, the train then being at the depot, where it stopped a moment to put out the caboose passenger, and the witness testifies that but a moment before the train came along he saw the deceased lying on the track. The witness himself had come to that corner to meet the train. In connection with his testimony the situation of the Voss house, in front of which deceased was struck, becomes important. If the deceased was not already lying on the tracks when the locomotive started from Third street, then, if the testimony of the witness is to be accepted, the deceased must have staggered from the corner to the centre of the square in the period the train was moving slowly from the Third street corner. Then he either fell before the engine came within the distance he could have been perceived, fixed by the testimony at from one hun-

McGuire et al. vs. Railroad Co.

dred and fifty to two hundred feet, and should have been seen in ample time to save him, or he fell after the engine came within that distance and necessarily in full view of the engineer, thus giving him ample time to stop the train. On either theory as to the time he fell, it seems to us negligence in not perceiving the deceased is fixed on defendant. This witness does not state he saw deceased fall. On cross-examination the witness testified that after the deceased went down the track (i. e., toward Fifth street) witness stood on the corner looking toward the engine, then moved away to meet the advancing train on which he expected to get. He testified he was not watching the deceased; saw him start down the track, and paid no further attention to him. The witness was thirty feet back of the engine when it stopped, came up to it after it stopped, and describes the position of deceased. As the witness does not state he saw deceased fall, was not watching him as he started down the track, and paid no further attention to him, we do not attach much weight to the witness' statement he saw deceased lying on the track, and we are inclined to think witness mingled inference with his personal knowledge, or that, testifying a long time after the accident, his testimony is not accurate. But if *this witness, moving away from the corner in a direction opposite to that of the deceased going down the track, and actually back of the engine when it struck the deceased*, could see the deceased lying on the track, the engineer and fireman, both on the engine, certainly could have seen the deceased reeling down and falling on the track. If, therefore, there was the sudden fall of a man staggering down and along, or upon, its track, in our opinion it could not but be seen by the engineer and fireman, if they could see or had been looking ahead. Such a fact would have impressed itself on their minds, and the statement would have come from the engineer of the staggering man and his sudden fall on the track. No such statement is made by him nor by any one until this witness produced on the second trial is brought forward. The fireman on the engine looking ahead saw nothing. Nor the engineer, if either the statement imputed to him is to be accepted or his own testimony adopted. His first intimation, according to the testimony as to his remark, was feeling something under the engine. His own explanation not placing the matter in any better light, as we think, is he saw an object so close as to be practically under the wheels before perceived. Why, on any theory admissible in the

light of all the testimony, he did not see the man before, is, to our minds, to be attributed to inattention, or inability to see at all. It is our conclusion, on the whole testimony, that if the deceased was lying on the track before the engine left Third street, running over him was inexcusable; or if staggering along and falling on the tracks after the engine left Third street, then he should have been perceived within even less than the viewing distance established by the testimony, and the train stopped before reaching him.

It is urged that plaintiff can not recover because intoxicated, in that condition exposing himself on defendant's tracks, and because a trespasser on private property. Our attention has been directed to that class of railway accident cases in which the fact the injured party was a trespasser has been considered. It has been held one walking on a spur track laid on the surface of a public alley though not imbedded so as to form part of the road-bed is a trespasser, and the railroad owes him no duty except to avoid injuring him if possible after he is discovered. If this is to be accepted and applied by this court to railroads running through cities, it would seem that however gross the neglect in not seeing in time to save his life, a human being on the tracks, there is no responsibility for running over and killing him, if when at last discovered some effort apt to be abortive is made to avoid the calamity. Other cases brought to our notice hold there is no obligation on railroad companies with respect to persons on their tracks, except the general duty to look out for obstructions. This, in our view, is a scant expression of duty, but yet recognizes some obligation on the part of those who run railroads, even with respect to the imprudent who are on the tracks. Our attention is directed also to the recent decision of this court absolving the road from responsibility for running over a man on the tracks. The man was deaf, his infirmity, of course, not known to the train engineer, who, though perceiving the man walking, his back toward the approaching train, naturally presumed he would get out of the way. The man, unconscious of the danger, neither hearing or looking behind, was run over, the train being at full speed, running not in a city but in the country and could not be stopped in time. The *Schexnaydre Case*, 46 An. 248; see also 1st Thompson on Negligence, 449.

Our courts have held that railroad companies are not obliged to enclose their tracks. This supposes that reasonable care to avoid

McGuire et al. vs. Railroad Co.

accidents to persons on the tracks will always be used, especially in running trains through cities. Imprudent people will walk on railroad tracks, and while that imprudence is always to be considered an element in adjusting the issue of responsibility, we are not prepared to hold that railroads passing their trains through centres of population, even though their tracks are laid on railroad property are under no obligation to avoid running over people, except that announced in some of the cases brought to our notice and to which is given careful attention. To hold with reference to tracks passing through cities, that the mere general duty, as some of these cases express it, to look out for obstructions; or, as other cases have it, that running over a person is to be excused because when discovered then the attempt is made to save his life, would, it seems to us, be apt to invite recklessness in the running of railway trains. Our court, as we appreciate the decisions, has never announced, even with respect to trespassers on tracks, the very limited duty of railroad employes expressed in some of the cases urged upon us in this case. We think the measure of responsibility in such cases is better stated by one of the text writers thus: "The company has no right to inflict wanton injury on persons unlawfully on their location, and when human life or limb is concerned the injury may well be considered wanton when, though able to do so, they neglect to arrest the engine which they have good reason to believe will, without an effort to stop it, result in injury to the wrongdoer, not necessarily an outlaw as to his property, still less as to his person."

Thus it appears that the trespasser, i. e., the wrongdoer, and, we may add, the helpless drunkard on the track, is not withdrawn from all protection, although on the tracks where he has no business to be. See *Pierce on Railroads*, 330. Mr. Thompson, recognizing some variance in the authorities alluding to the English rule followed in some of our courts that "except at crossings any man that sets his foot on the track does so at his peril," yet states the responsibility affirmed by courts with respect to trespassers, thus: "The liability exists if there is any failure on the part of the railroad employes to use proper care for avoiding the accident after the person is discovered on the track, or if that discovery, by using proper care, would have been made and the calamity averted. Thompson on Negligence, p. 449, citing a long array of decisions of the courts of Pennsylvania, Indiana, Ohio, Tennessee and other States.

On reason and authority the mere fact of trespassing on the tracks will not excuse a railroad company for destroying life. The obligation of reasonable care to avert such result still remains in the company. The defence of contributory negligence arising besides from the intoxication and consequent imprudence of the deceased is urged with ability and supported by references to our own as well as the jurisprudence of other States. The common form of statement of the defence imports that relief is denied the injured party if his imprudence has contributed to the accident. The frequency of this class of cases has made all familiar with the general proposition of the defence. The qualification of the proposition enforced, as we think by reason and of authority, is not of such frequent application. It is to be observed that in the strongest expressions in the text-books of contributory negligence such defence is qualified by some reference to the negligence of the defendant. Thus where negligence is the gist of the action it is, to use the language of the text writer, for the jury under the direction of the court to ascertain whether the defendant has failed to exercise due care and by want of it caused the injury, and also whether the plaintiff has failed to exercise due care and by want of it contributed to the injury. *Pierce on Railroads*, p. 313, citing the authorities. *Thompson* cites an English case; the syllabus is, if A exposes his property and B negligently injures it, B must pay damages if by ordinary care he could have avoided the injury. In that case *Parke J.* observed: "Although the donkey was wrongfully in the place, still defendant was bound to go along the road at such a pace as would be likely to prevent mischief; were this not so, one might justify driving over a man asleep. The general proposition it seems to us that negligence of the injured party defeats recovery is well enough, but like all general rules has its qualification, and is not to be understood, nor as we understand the decisions has never been applied, to sanction gross negligence of a railroad company. The drunkard lying on the track exhibits negligence and helplessness. But for all that we do not understand, on any proper application of the defence of contributory neglect, that running over him is to be excused, if by the ordinary precautions it can be avoided. If his imprudence is brought into view as contributing to his death, certainly it would seem some account is to be taken of the carelessness of the train officers, but for which the drunkard's imprudence would not have

McGuire et al. vs. Railroad Co.

forfeited his life. We therefore can not accept the defence of contributory negligence as dispensing railroad companies from all care to avoid accidents. The defence is in our view subject to a qualification generally accepted. The qualification has become more important with the introduction of railroad lines now spread throughout the country and its application has been suggested as imperatively requisite to guard life and limb against recklessness in the management of railway trains. In the light of our jurisprudence it is not to be said that imprudence of pedestrians, or those driving near or across tracks, justifies the disregard by railroad employes of all precautions to protect the unwary, those of feeble age, the child, or even the helpless drunkard. Nor do we mean that imprudence in going upon tracks is not to be without its influence in protecting railroads from liability." We enforced that protection in the Schexnaydre Case, 46 An. 248; 1st Thompson on Negligence, 450.

We are safe, we think, in affirming as a rule of protection to limb and life that neglect or imprudence of persons injured by railroad accidents will not shield the company from damages, if with proper care their employes in charge of the train can avoid the injury and fail in that care. Thus qualified, contributory negligence is not to be deemed a license for recklessness and neglect. The qualification is aptly stated in a recent decision of the Supreme Court of the United States, and in our appreciation finds application to this case. "Although the defendant's negligence may have been the primary cause of the injury, yet an action for such injury can not be maintained, if the proximate and immediate cause can be traced to the ordinary care and caution of the persons injured. Subject to this qualification grown up in recent years, that the contributory negligence of the party injured will not defeat recovery, if he shows the defendant might, by the exercise of ordinary care and prudence, have avoided the consequences of the injured party's negligence." Grand Trunk R. R. Co. vs. Ives, 144 U. S. 429; the court citing Inland Seaboard Coasting Co. vs. Tolson, 139 U. S. 551, 558; Donahue vs. St. Louis, etc., R. R., 91 Mo. 357; Cooley on Torts, 675, and other authorities; Patterson's Railway Accident Law, 51, 55 and 61.

The judgment in this case is supported by the verdicts of the juries. The case turns mainly on the issue of fact. The defendant assails the testimony of some of the witnesses as that of discharged employes, and attributes the verdict to jury prejudices. In

view of all this, we have gone over the record with care. That the engine was so defective as to seriously diminish the efficacy of the headlight, designed to guard against accidents, is, we think, shown, and along with the insistence that this defect had no connection with the accident, we can not close our eyes to the statement of the engineer, who, claiming there was no escaping steam unless steam was worked, admits that the invariable rule on starting and switching was to work steam for one hundred and fifty to two hundred yards, then shut off steam and roll down into the yard. It seems to us, this concedes that for part of the distance at least, between the depots, the train was moving toward the deceased with its headlight obscured by escaping steam. The four whistles to which the witnesses testify were signals of disaster, not of caution. The leading fact standing out prominent in the record, is that a locomotive moving at a pace not faster than a man's walk, and with a headlight capable of revealing objects one hundred and fifty feet ahead, not adopting the greater viewing distance stated by some of the witnesses, runs over and kills a man, not discovered until the wheels are upon him, or but a brief moment before. With the best attention and consideration of this record we are unable to perceive any basis to dissent from the verdict, under our jurisprudence entitled to great weight. As to the view of the trial judge to which our attention is directed in defendant's brief, his language is he "maintained the first rule for the new trial for like amount as fixed by the jury as excessive," and he alludes to the condition of public feeling as his reason for refusing the third trial. If by this he means that his reason for giving the new trial on the first verdict was the amount of the verdict, we concur with him. On the issue of the liability for the company for some amount, we think the solution of the jury correct.

It is difficult to adopt a standard of damages for loss of life. The law gives the surviving parents damages the deceased could have recovered if he had survived the injuries, and damages for the support the parents might have derived from the deceased. The circumstances of each case must control the award. Our courts have allowed from one thousand dollars up to five thousand dollars; rarely more. We believe in other States the verdicts in such cases have been moderated by the sense of justice and of a due regard to all the facts. Under all the circumstances of this case we think one thousand dollars would be proper. While enforcing the responsi-

McGuire et al. vs. Railroad Co.

bility of railroad companies in this class of cases, it is equally important verdicts of juries should be reduced when manifestly excessive.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that plaintiffs do have and recover from defendant one thousand dollars with five per cent. interest from date of the judgment of the lower court; the costs of the lower court to be paid by defendant, those of this court by the plaintiffs.

DISSENTING OPINION.

MCENERY, J. The uniform doctrine announced by this court has heretofore been that if the evidence shows that the plaintiff himself was guilty of contributory negligence there can be no recovery, and that the plaintiff must show that he was in the exercise of due care when the injury happened. The proof need not be direct, but may be inferred from the circumstances.

It is useless to cite authorities, as every case in our reports where the fact of contributory negligence has been discussed this doctrine has been affirmed.

In the case of *White and Husband vs. Vicksburg, Shreveport & Pacific Railroad Company*, 42 An. 992, in referring to this well established doctrine the court said: "The defence is a general denial, and a plea of contributory negligence. It has been ruled with such frequency and uniformity as to make its iteration here merely formal, that to sustain recovery in such a case it must appear from the record: (1) that the defendant was guilty of negligence; (2) that the party injured was guilty of no contributory negligence—i. e., negligence but for which, notwithstanding defendant's negligence, would have been avoided."

The facts, as stated in the opinion, show that the accident could not have happened had it not been for plaintiff's negligence. *Factors and Traders Insurance Company et al. vs. Philip Werlein*, 42 An. 1047; *Stella V. Burbank, vs. Illinois Central Railroad Company*, 42 An. 1158; *Dennis Clements and Wife vs. Louisiana Electric Light Company*, 44 An. 692; *Herman Herlisch vs. The Louisville, New Orleans & Texas Railroad Company* 44 An. 280; *Mrs. Nina Palard vs. Chicago, St. Louis & New Orleans Railroad Company et al.*, 44 An. 1003; *Mrs. M. D. Ryan vs. Louisville, New Orleans & Texas Railroad Company*, 44 An. 806.

The negligence imputed to the railroad company is that its servants in charge of the train did not see the deceased until too late to avoid the injury, and a failure to give the necessary signals in passing through the town of Monroe.

It has been uniformly held by this court that when the defendant has contributed to his own injury he can not recover, unless there has also been negligence on the part of the defendant, amounting to a wanton and reckless infliction of the injury.

While it has been held and seems to be the universal rule that the railroad company owes no duty to a trespasser upon its track to keep its machinery in order for his benefit, I think in this case if the injury had been inflicted at the time when the engine was out of order, that an envelope of smoke and steam covered it and the engineer's vision was so obstructed that he could not see beyond the engine, and the headlight of the engine was so hidden by a curtain of steam and smoke in front of it, so that it was practically extinguished, reckless and wanton infliction of injury could justly be inferred from the negligence of the company in running such a train over its tracks.

But the opinion eliminates this defective condition of the engine from the facts which led to the accident and unfortunate death of plaintiff's son. It is stated that the train was running very slow, the headlight was shining brightly, and that objects on the track could be seen at a distance of one hundred and fifty feet or more. The negligence of defendant, then, was not in giving the signals that the train was on its way from depot to depot in a town, and the failure of the employes to see the deceased in time to avert the injury.

These omissions of defendant's servants, I respectfully submit, can not be classed with that degree of negligence which is called wanton or reckless.

There is ample authority in our reports for this statement. In case of *Brown vs. Railroad Company*, 42 An. 356, the accident happened at a railroad crossing. In that case we said: "It was negligence on the part of the engineer to have omitted to sound the whistle at a quarter of a mile before that crossing; but that omission did not render the accident inevitable if, on the other hand, Brown had been sufficiently prudent and careful when he approached the crossing."

The opinion is supported by a long citation of authorities, among the number the case of *Continental Improvement Company vs Stead*,

McGuire et al. vs. Railroad Co.

95 U. S. Rep. 161, in which case the United States Supreme Court said: "No failure on the part of the railroad company to do its duty will excuse any one from using the senses of sight and hearing upon approaching a railroad crossing, and whenever the due use of either sense would have enabled the injured person to escape the danger the injury is conclusive of negligence, without any reference to the railroad's failure to perform its duty."

The principle announced in this case was more emphatically expressed in *Herlich vs. Railroad Company*, 44 An. 280, in which we said: "A careful examination of all of the testimony has fully satisfied us of the correctness of his statements in the main, and it further satisfies us that the defendant's employes were neglectful of their duties under the general principles of law as well as under the ordinances of the municipality, in reference to keeping a flagman at the street crossing, the exhibition of a red light, etc. And the evidence renders it exceedingly doubtful that a bell was rung or a whistle sounded.

"Taken all in all, however, the evidence fairly makes out a case of negligence on the part of the company. They were evidently unmindful of the rights of pedestrians, who had equal rights to use the crossings, as they had to pass their trains over it.

"But while this is perfectly true, we are quite as thoroughly satisfied that the plaintiff was himself guilty of negligence, which directly caused or contributed to the accident by which his injuries were inflicted." Also see *Mrs. Kate A. White and Husband vs. Vicksburg, Shreveport & Pacific Railroad Company*, 42 An. 990; *Emma Brown et al. vs. The Texas & Pacific Railway Company*, 42 An. 350.

In the cases cited the accidents were at the crossings, where the defendant had a right to be. In the instant case the accident happened where the plaintiff had no right to be, as he was in fact a trespasser on defendant's track.

The court held in the cases referred to that the negligence was simple negligence, not amounting to wantonness or recklessness, or, to define it more exactly, the purposely inflicting of the injury. If the court had not so held, judgment would necessarily have been for plaintiff. Also see *L. & N. R. R. vs. Markee*, 15 So. Rep. (Ala.) 511; also see *Verner vs. R. R.*, 15 So. Rep. (Ala.) 874.

Considering the negligence of the railroad officials, the evidence shows that deceased was equally negligent, therefore the fault of

both was mutual, and no suit for damages can be maintained. Factors and Traders Insurance Company *et al.* vs. Philip Werlein, 42 An. 1050; Henry Levy vs. The Carondelet Canal and Navigation Company, 34 An. 180; A. F. Cochran vs. Ocean Dry Dock Company, John L. Sterry *et al.*, Third Opponents, 30 An. 1365; Dennis Clements and Wife vs. Louisiana Electric Light Company, 44 An. 692.

I will refer to only recent cases in other jurisdictions, which are in line with the jurisprudence of this State. I know of no exception to the rule stated above.

In the case of Railway Company vs. Regan, 107 Ind. 51 (7 N. E. R. 807), the facts were that the injury occurred at a street crossing in a populous city, where the injured party was not a trespasser, where he had the right to be, and where the company was required to anticipate his presence. Plaintiff's demand was rejected, the court saying: "To constitute a wilful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of. It involves conduct which is *quasi*-criminal.

In the case of Baker vs. Pennsylvania Company, N. E. Rep. 504, the syllabus is: "Though there are usually large numbers of people in the immediate vicinity of such switch and archway, and a four-foot walk along one side of the latter, which is used by persons passing through it, the running of a car through such archway at a high rate of speed is nothing more than negligence in the absence of actual knowledge by the company's operatives of the presence of deceased in such archway, and is not such wilfulness as renders the company liable notwithstanding deceased's negligence."

In distinguishing between wilfulness and negligence, the court, in the case cited, said wilfulness does not consist in negligence; on the contrary, as illustrated in the case of Bryan vs. Mann, heretofore cited, the two terms are incompatible. "Negligence arises from inattention, thoughtlessness or heedlessness, while wilfulness can not exist without purpose or design. * * * The railroad company owes to the trespasser no protection against negligence. It does owe him the duty of all reasonable effort to avoid injuring him when his presence and his own inability to avoid injury are known to it, but does it owe such duty when his presence is not known? It would seem that a negative answer is all that the inquiry is susceptible of.

McGuire et al. vs. Railroad Co.

The circumstances should be such as to charge the operatives with knowledge, actual or imputed, of the presence of the trespasser, and of his inability to avoid injury, before any duty of the company arises to require of it affirmative acts or efforts to avoid injuring him. By imputed knowledge in such case, we mean such as should be implied from the conduct of the party or others within the actual sight or hearing of such operatives. It is upon such knowledge that wantonness is held the equivalent of wilfulness." *Louisville & Nashville Railroad Company vs. Markee*, 15 So. Rep. 511; *Verner vs. Alabama G. S. R. Co.*, 15 So. Rep. 872; *Oatts vs. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 22 Southwestern, 330; *Texas & Pacific Railway Co. vs. Nicholson et al.*, 22 Southwestern Rep. 770; *France's Admr. vs. Louisville & Nashville Railroad Co.*, 22 Southwestern Rep. 851; *Chenery vs. Fitchburg Ry. Co.*, 35 Northeastern, 554; *McAdoo vs. Richmond & Danville Ry. Co.*, 11 Southeastern Rep. 316; *Hogan's Admr. vs. Tyler*, 17 Southeastern Rep. 723; *Marks' Admr. vs. Railway Co.*, 18 Southeastern Rep. 299.

The list of authorities in support of the doctrine in the above cases could be extended to an indefinite length.

The distinction between negligent injury and one resulting from wilfulness is clearly defined in American and English Encyclopedia of Law, 36th par., page 80, Vol. 4, and notes. It is there stated: "Wilfulness and negligence are the opposites of each other, the one signifying the presence of intention or purpose, the other its absence."

The case of *Grand Trunk Railway Company vs. Ives*, 144 U. S. 429, quoted approvingly in the opinion, is opposed to the views expressed in the opinion.

In this case the court emphatically announced the doctrine that if the deceased contributed by his negligence to the injury, the railroad was not responsible, and the opinion of the court is in line with the weight of authority and the few cases referred to herein.

In charging the jury as to the degree of care exercised by the deceased the lower court said: "If he did so act, and the railroad company was negligent, his administrator is entitled to your verdict, whether it was negligent or not. If it was not negligent it is entitled to your verdict, no matter how Smith acted."

Mr. Justice Lamar, the organ of the court, in commenting on these instructions, said in the opinion: "These instructions are so full and

Suthon vs. Town of Houma.

complete, and are in such entire accord with the rules of law applicable to cases of this character, that no fault whatever can be found with them."

To support the opinion, references are made to *Pierce on Railroads*, p. 343, where the law is stated to be that if the injured party at a railroad crossing fails to listen for signals and to look for trains in different directions he can not recover of the company, although it may be chargeable with negligence, or have failed to give the signals required by statutes, or be running at the time at a speed exceeding the legal rate; and reference is also made to 4 Am. and Eng. Ency. of Law, 68, 78 and notes.

This opinion has already exceeded proper limits, and I will conclude by saying that the authorities all say, cases and text-books, that the operative of the railroad must have knowledge, either actual or imputed, of the presence of the trespasser upon its tracks, and that the railroad company can be held liable only when, knowing the presence of the trespasser upon its track, it fails to timely provide efforts to prevent injury to him.

The deceased was making use of the railroad embankment for his own convenience. It is not in evidence that the operatives knew he was on the track. The fact of their not having seen him is not even negligence, certainly not such a degree of wantonness as to amount to wilful infliction of the injury.

Rehearing refused.

No. 11,653.

L. F. SUTHON VS. THE TOWN OF HOUMA.

The jurisdiction of this court of cases involving the constitutionality or legality of taxes, fines, penalties or forfeitures imposed by a municipal corporation does not extend to a case presenting the question of the validity of the payment by a dog owner of a so-called dog tax, under the town ordinance authorizing the killing of dogs running at large, without a collar obtained from the town and to be paid for by the owner of the animal. Constitution, Art. 81.

A PPEAL from the Third Justice's Court, Parish of Terrebonne.
Bourg, J.

46	1561
47	847
48	1561
49	451

Suthon vs. Town of Houma.

L. F. Suthon, Plaintiff and Appellee, in propria persona.

L. C. Moise for Defendant, Appellant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MILLER, J. The plaintiff paid under protest, and now sues to recover back the amount exacted by the town of Houma, under an ordinance authorizing the killing of dogs running at large, unless provided with a collar, to be obtained from the town authorities on payment by the owner of the dog of the dog tax, as it is called, required by the town. The justice of the peace gave the plaintiff judgment, the town appeals, and plaintiff moves to dismiss the appeal.

This court has no general supervision over ordinances of municipal corporations. The appellate jurisdiction of the court extends to cases involving the legality or constitutionality of taxes, tolls, imposts, fines, penalties or forfeitures imposed by municipal corporations. Constitution, Art. 81. This dog ordinance is a police regulation to abate a nuisance. The owner of a dog is permitted to secure his animal from the operation of the ordinance, on payment of the so-called dog tax, more properly the collar fees. The amount so paid is not a fine or forfeiture; nor is it a tax on property. The payment is not obligatory. The part of the ordinance relating to this collar fee is an incident of a police regulation, the validity of which is not submitted to the revisions of this court. Similar ordinances have been sustained as measures of police within the competency of the police power of town corporations, but it is enough for us to say we have no jurisdiction.

The motion is sustained to dismiss the appeal.

Hill et al. vs. Sheriff, etc.

No. 11,641.

JOHN HILL ET AL. VS. T. S. FONTENOT, SHERIFF, ETC.

A. L. ABBOTT VS. SAME.

ALMA AIKEN VS. SAME.

ALFRED SLIDELL VS. SAME.

LEVY DUSSON ET AL. VS. SAME.

J. MEYERS & CO. VS. SAME.

L. GODCHAUX ET AL. VS. SAME.

L. GODCHAUX VS. SAME.

VINCENT BOAGNI VS. SAME.

J. E. VANNOY VS. SAME.

BOAGNI & LEVY VS. SAME.

ELIZA DIXON VS. SAME.

CLEMENTINE PHELPS VS. SAME.

W. C. SCOTT VS. SAME.

BOAGNI & LEVY VS. SAME.

46	1563
51	1920
46	1563
104	700
46	1563
112	905

The tax of five mills imposed by the Levee Board of the Red River, Atchafalaya and Bayou Boeuf Levee District under the act creating said board is authorized by the Constitution. Constitution, Art. 214, Act No. 79 of 1890; No. 46 of 1892, Secs. 6 and 10.

The court again affirms that the acreage assessment for levee and drainage purposes, authorized by the acts creating the Levee Boards, is not within the scope of the limitations in the Constitution on general taxation. Charnock vs. Levee Company, 38 An. 327; 39 An. 455; 43 An. 15; 45 An. 1232.

Under these Levee Board Acts of 1890 and 1892 all alluvial lands within the districts subject to overflow are subject to this acreage assessment, except those reported by the engineers to be incapable of protection by the system of levees and drainage proposed by the acts. Secs. 1, 6, 10, 15.

The acreage assessment of five mills per acre is imposed on the theory that the expense of levees and drainage should be borne by all the lands, each acre bearing its proportionate share, the act supposing that it cost as much to drain one as it does another acre, and that each acre is benefited to the extent of its proportionate share of the expense; this acreage assessment without reference to the value of the land is approximative equality, perfect equality of taxation being unattainable; finds recognition in our past levee and drainage legislation and has had the sanction of our courts.

It is a legislative question to determine whether the alluvial lands of the State subject to overflow can be reclaimed by drainage and levees, and it is also the legislative function to prescribe the rule and objects of taxation to effect this reclamation. No court can set aside the legislative determination in this respect unless the legislation violates the organic law. Cooley on Taxation Chapter 20, p. 428, 429; Levee cases already cited.

It must be a clear case to authorize the court to set aside an assessment for local improvement imposed by legislative authority and hold in opposition to the legislative judgment that lands assessed for the expense of improvement can never be benefited by the proposed improvement; this is not such a case. *Ibid.*; also 8 An. 472; 12 An. 517; 2 An. 186.

Hill et al. vs Sheriff, etc.

A PPEAL from the Eleventh District Court, Parish of St. Landry.
Perrault, J.

Thomas H. Lewis and E. North Cullom for Plaintiffs, Appellants.

White & Thornton and John N. Ogden for Defendant, Appellee.

The opinion of the court was delivered by

MILLER, J. The plaintiffs in these consolidated cases resist the payment of the taxes for levee purposes, levied by the Board of Commissioners of the Red River, Atchafalaya and Bayou Boeuf Levee District, under the authority of the legislative act No. 79 of 1890, amended by act No. 46 of 1892. This legislation provides in the sixth section for the tax authorized by Art. 214 of the State Constitution, to be levied by the board on all property in the district liable to taxation for levee and drainage purposes, and the tenth section of the act empowers the board to levy besides an acreage tax on all such lands of five cents per acre. Under these acts the board imposed the tax of five mills authorized by Art. 214 of the Constitution and the act, and besides levied the acreage tax in accordance with the tenth section of the act.

The petition assails these taxes on the grounds substantially that petitioners' property alleged to be neither reclaimed or susceptible of reclamation by the levee system is not within the scope of the taxes authorized by the acts; that the taxes if applied to the property, violate Art. 1 of the Constitution of the State, announcing the protection of life, liberty and property to be the object of government, and Art. 156 prohibiting the taking of private property without compensation. It is charged also the taxes applied to petitioners' property violate the rule of uniformity of taxation, and taxation according to value prescribed by Arts. 203 and 218 of the Constitution. In this connection it is averred that cleared and cultivated lands, worth more, are taxed no higher than the lands of petitioners, alleged to be swamp and overflowed; that the levee district is a subdivision of the State and the valuation put on the property for State purposes is not the basis for the taxes claimed; it is charged that the acreage tax of five mills exceeds the constitutional limit, and is not an *ad valorem* tax; that the acreage tax is excessive; that in dis-

Hill et al. vs. Sheriff, etc.

regard of the equality and uniformity of taxation exacted by the Constitution, petitioners' lands in the Atchafalaya swamp are assessed for the acreage tax as high as cleared land fit for cultivation; the acreage tax it is alleged is really a tax of fifty mills per annum, and the answer insists that the petitioners' lands in the swamp, valuable only for timber, can never be improved or augmented in value by the levee system, and hence are exempted from taxation under these legislative acts, based as they are on the theory that the taxes will improve and increase the value of the lands to be taxed. The answer maintained the validity of the taxes, as did the judgment of the lower court, and from that judgment, refusing the injunction to restrain the collection of the taxes, the plaintiffs prosecute this appeal.

It is the mandate of the Constitution that the State shall be divided into levee districts, placed under the charge of boards of levee commissioners, and for the erection, maintenance and repairs of the levees, these boards are authorized to levy a tax on the property liable to taxation within the alluvial portions of the district subject to overflow. The limit of this tax was five mills, enlarged by the constitutional amendment of 1884 to ten mills if the increased taxation was approved by the vote of the tax-payers within the alluvial part of the district subject to overflow. Constitution, Art. 214; Amendment Acts 1884, No. 112, p. 149. Under this article of the Constitution, the commissioners of the Red River, Atchafalaya and Bayou Boeuf Levee District have imposed this tax of five mills. The courts have no jurisdiction to exert with respect to this tax, save to ascertain if the property on which it rests is of the character specified in the Constitution. It is not susceptible of controversy that the property taxed is alluvial under the taxing district, and subject to overflow. In so far as this controversy may be deemed directed against that tax, the answer is in theory organic law.

The plaintiffs' argument assails with great vigor the acreage tax of five cents per acre directed to be imposed by this act of 1892 on all lands in the district subject to taxation for levee and drainage purposes. The previous decisions of this court have maintained that this assessment or acreage tax is not within the limitations in the organic law on general taxation, and are to be viewed as assessments for local improvements. The discussion in this case recognizes the finality of these decisions, and concedes corresponding

Hill et al vs. Sheriff, etc.

limit of judicial inquiry. *Charnock vs. Levee Company*, 38 An. 327; *Planting Company vs. Tax Collector*, 39 An. 455; *Munson vs. Commissioners*, 43 An. 15; *Minor vs. Sheriff*, 43 An. 337; *George vs. Sheriff*, 45 An. 1232.

It is contended on behalf of plaintiffs, their land can derive no benefit from levees or drainage, and that the assessments resting on the theory that the lands can be thus benefited, under the guise of securing an impossible improvement, virtually propose the confiscation of the property, in violation of the constitutional provision prohibiting the taking of private property without compensating the owner. To the legislative judgment is necessarily submitted the question whether this benefit can be secured; a judgment not final, it may be claimed, but certainly not for judicial revision, except in clear instances of wrong and oppression. If rightfully imposed, the assessments can not be deemed confiscative, and the constitutional objection remits us to an examination of the question of benefit.

It is urged on us, too, that the lands, by reason of their situation and condition, are not within the scope of this levee legislation. By this is meant that the legislation applies only to lands capable of receiving protection from levees, and the argument claims these lands are beyond that protection. The testimony for plaintiffs shows the lands are overflowed from back-water as well as by rain-water. The witnesses testify that no leveeing would free the lands from back-water, and would tend to prevent the escape of rain-water; that near the water courses there is a ridge of light, sandy soil, but the lands slope to the swamp three-fourths to a mile back; that there are no settlers on the west side of the Atchafalaya below Petite Prairie, and none on the Courtableau for twelve miles from its mouth. With reference to a large part of the lands, the testimony is they are uninhabitable; that they are valuable only for timber, and, it is testified, can not be reclaimed except by levees and drainage, the cost of which would far exceed the value when reclaimed, if that ever could be accomplished. On the other hand there is the testimony produced by the board tending to show that by the levees and drainage proposed, the desired protection of the lands can be secured. In view of the character of the lands it is confidently claimed they were not intended to be embraced in the assessment. From all the light obtainable the Legislature has determined the limits of the taxing district. In the preamble to the act the pur-

pose is expressed, to establish a comprehensive system "to protect the entire district from destructive floods," and to confer authority to levy assessments on the lands to be protected. In the body of the act the board, besides the tax provided by the Constitution, is directed to levy assessments on all property within the district subject to taxation for levee and drainage purposes. Throughout the preamble and act it is the entire district that is made the subject of these assessments, the only exception being implied in the provision that on the application of the Police Juries lands may be excluded, reported by the engineers incapable of protection. Act No. 79, Sec. 15. On this branch of the case the conclusion seems to us inevitable that all lands in the district were intended to be and are embraced, save that reported as proper to be withdrawn by the engineers. So far then as the plaintiff's argument rests on the question of intention it is our opinion the lands of plaintiffs were unquestionably intended to be embraced in the scope of the act.

But it is contended on behalf of plaintiffs that this acreage assessment is arbitrary and indefensible, because levied on every acre in the district without reference to value. Thus the cleared lands of much greater value are taxed no higher than swamp lands assessed at only fifty cents, and it is claimed not susceptible of sale at that price. An additional inequality arises, it is contended, from assessing lands susceptible of protection from levees no higher than the lands claimed to be incapable of receiving such protection. There has been much diversity as to the best method of imposing local assessments, so as to obtain as far as possible equality, for all understand perfect equality of taxation is unattainable. If the Legislature were to classify the property for assessment on the theory that some property, by reason of its situation, would derive more benefit from the proposed improvement than other property, it is quite likely that injustice would still be done. Assessments for a local improvement higher on property supposed to be specially benefited than on other property in the same district would probably be quite as distasteful as any other mode of taxation, certainly to those called on to pay the higher tax.

The legislative judgment in this system of classified assessments that A should pay a greater assessment than B on property they own in the district of the proposed improvement might be acceptable to B, but not to A, and it is not at all unlikely inequalities would exist

Hill et al. vs. Sheriff, etc.

in any such mode of adjusting assessments. In our sister State of Mississippi these assessments for levees are adjusted in proportion to the distance of the land from the river. This is urged on us as equitable. Yet it might be deemed arbitrary that land twenty miles from the river, and, perhaps, safe by reason of its peculiar situation from any overflow, should pay the same tax as land within ten miles of the river, inevitably to be submerged in seasons of high water. Defects in our opinion may well exist in any system of assessment, and all that can be exacted is approximate equality. We think acreage taxation meets this requirement. It proceeds on the theory that it costs as much to drain one acre as another. The same levee and drainage work required to protect lands on or near the river suffices to protect the low lands in the rear. If there is error in this theory it arises from the fact that the expense is greater because the lands in the rear require more leveeing and drainage work than the front lands. But the acreage system of assessment calls on all the lands to pay only its proportion of the expense of the local improvement. The system supposes that if the front lands are benefited five cents per acre, that the low lands in the rear, though less valuable, are benefited five cents an acre, the proportion to each acre of the expense incurred. The acreage system of assessment is, after all, in our judgment, as equitable as any, and has been sanctioned in our past legislation and sustained by our courts. See *Wallace vs. Shelton*, 14 An. 498; the *Drainage Cases*, 11 An. 338, and by implication, if not expressly, in our decisions already cited under this levee legislation.

There remains the contention that plaintiffs' lands can not be benefited by levees or drainage, and hence can not be made subject to assessments, resting solely on the theory that the lands will be improved by the levees and drainage proposed. It is a legislative question to determine the property on which assessments are to be placed for local improvements, or in other words, to determine the property within the scope of the improvement and to be taxed for the expense. *Cooley on Taxation*, Chap. 20, pp. 428, 429. The wisdom of the Legislature in selecting the objects of taxation, it has been well stated on more than one occasion, is not a question for courts. Of course, if taxation, so called, infringes on any limitation of the organic law, lower courts can grant relief. But, subject to this judicial control to protect the constitutional right of the citizen, the

Hill et al. vs. Sheriff, etc.

power of taxation is absolute in the legislative department. *Bordelon vs. Lewis*, 8 An. 472; *Layton vs. New Orleans*, 12 An. 517; *Municipality vs. Duncan*, 2 An. 186; *Planters' Co. vs. Tax Collector*, 39 An. 462; *Minor vs. Daspit*, 43 An. 337. We have in the legislation called in question here the judgment of the legislative department of the advantage and practicability of a scheme of levee and drainage to protect from inundation the district created by the act, and the legislative directions that taxes shall be imposed on the lands within that district. We are asked to determine the Legislature was entirely wrong in its judgment in including plaintiffs' lands within the scope of the proposed improvement and the assessments to be imposed. We have in these acts the exhibition of a system of levees accompanied with a scheme of drainage proposing the great benefit of reclaiming our alluvial lands. Of course large expense is to be incurred, hence the taxation and assessment. There is the scientific judgment on behalf of the board that this result can be achieved. Even the testimony of the defendants seems to concede this, but attended with an expense, in their opinion, greater than the value of the lands. Is this court, on the strength of that opinion, to determine, in opposition to the legislative judgment, that the alluvial lands of the State in the situation of those of plaintiff must forever remain in their present condition of overflow? We must take notice that the alluvial lands of the State once subject to overflow have been, in great part, reclaimed by the methods proposed by this legislation. Our appreciation of the legislation and of the testimony with reference to this subject brings us to the conclusion there is no basis to hold these lands can not be reclaimed, and thus substitute the judgment of this court for that of the legislative department, far better qualified to determine the question of benefit involved.

It is therefore ordered, adjudged and decreed that the judgment of the lower court in the following entitled consolidated cases:

John Hill et al. vs. T. S. Fontenot, Sheriff, etc.

A. L. Abbott vs. Same.

Alma Aiken vs. Same.

Alfred Slidell et al. vs. Same.

Levy Duson et al. vs. Same.

J. Meyers & Co. vs. Same.

L. Godchaux et al. vs. Same.

L. Godchaux vs. Same.

Mathis vs. Board of Assessors et al.

Vincent Boagni vs. Same.

J. E. Vannoy vs. Same.

Boagni & Levy vs. Same.

Eliza Dixon vs. Same.

Clementine Phelps vs. Same.

W. C. Scott vs. Same.

Boagni & Levy vs. Same.

Be affirmed at the costs of the appellants.

No. 11,520.

LOUIS MATHIS VS. THE BOARD OF ASSESSORS ET ALS.

The land between the levee and the river, though submerged at the high stage of the river, is the property of the riparian proprietor, subject to public uses. Civil Code, Arts. 455, 457; 10 La. 19; 11 La. 170; 8 Rob. 211.

Such land, if used by the riparian owner or from which he derives a revenue, is subject to taxation.

A PPEAL from the Second City Court of New Orleans.
Morel, J.

Louque & Pomes for Plaintiff, Appellant.

E. A. O'Sullivan, City Attorney, and *Horace L. Dufour*, Assistant City Attorney, for Defendants, Appellees.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues to cancel an assessment against him of land between the levee and the river in front of his property. He claims the land is not liable to assessment. The judgment of the lower court maintained the assessment and plaintiff appeals.

The character of such land is defined by the Code. The levee is deemed the bank of the river, and is that which contains the water at the ordinary high stage of the river. The ownership of the banks is in those who possess the adjacent land, but subject to public uses. Civil Code, Arts. 455, 457.

We have had some difficulty in reaching a conclusion in this case. We are not dealing with the general proposition as to the taxability

Gladdish et al. vs. Godchaux.

of batture. It is in evidence here that the riparian proprietor, the plaintiff, placed a fence around the land. It is true the amount derived was inconsiderable, but still the fact is in the record that the riparian owner leased the property and received rent from tenants. Our courts have affirmed leases of batture by riparian proprietors. We are not at liberty to hold that land, although between the levee and the river, is not subject to taxation when used by the front proprietor for the purposes of revenue or otherwise. The ownership of such land, in a certain sense, is recognized by the Code, and in this case the rights of private ownership have been asserted by plaintiff. Under such circumstances we think the land is subject to taxation. See *Chase vs. Turner*, 10 La. 19; *Nicholls et al. vs. Byrne*, 11 La., 170; *Dennistoun et al. vs. Walton*, 8 Robinson, 211.

We think therefore the plea of *res judicata* based on the judgment of the Civil District Court, holding the land not subject to taxation, can not prevail.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

Rehearing refused.

No. 11,662.

MARY E. GLADDISH ET AL. VS. LEON GODCHAUX.

On the issue of ownership defendant, relying on titles which, it is claimed, inadvertently omitted one of the lots of the plantation, the subject of the sales, the error may be alleged in an amendment to the general issue contained in the original answer, the amendment not changing the issue. Code of Practice, Arts. 419, 420; 2 Hennen's Digest, 1181, No. 9; *Payne vs. Railroad*, 38 An. 164.

Parol is admissible to show that the undivided half of one of the lots, part of a plantation, was omitted by error, in a sheriff's deed. The proof of the alleged error must be clear; and in this case is deemed to be furnished in the act of mortgage under which the order of sale was obtained, describing the plantation by name, enumerating the lot in dispute as part of it; the order of sale directing the sale of the mortgaged property and all other property of the deceased mortgagee, and the adjudication presumably following that order, this evidence being supplemented by the closing of the succession of the deceased and the conduct of the parties manifesting, in the view of the court, their appreciation the sheriff's sale carried the property in dispute, all leading to the conclusion the omission in the sheriff's deed of the lot in dispute was an inadvertence. 1 Story's Equity Jurisprudence, Sec. 152; 15 La. Rep. 311; 9 An. 29; 35 An. 560; 37 An. 203; 44 An. 352.

A PPEAL from the Eighteenth District Court, Parish of Lafourche.
Caillouet, J.

46 1571
108 532
46 1571
113 41
46 1571
115 178
46 1571
116 966

Gladdish et al. vs. Godchaux.

Beattie & Beattie for Plaintiffs, Appellees.

Lazarus, Moore & Luce and *Clay Knobloch & Son* for Defendant, Appellant.

The opinion of the court was delivered by

MILLER, J. The plaintiffs, the widow and heirs of James Billiu, seek to recover from defendant certain property in the parish of Lafourche, known as lot No. 16, on the left bank descending of the Bayou Lafourche, about sixteen miles below Thibodaux. They trace title to one undivided half as derived from their father, and aver title from Clara S. Perkins to the other undivided half.

The defendant, Godchaux, answered, pleading the general issue, prescription, and set up title from Meyer and Joseph Weill of date October 25, 1892; by a supplemental answer, defendant alleged that lot No. 16, claimed in the suit, formed part of Utopia plantation; that the title thereto of James Billiu and Mrs. Perkins, under whom plaintiffs' claim was divested years before by sales to Marion W. Billiu, under whom defendants claim by various conveyances; that in these conveyances, all conveying the Utopia plantation, lot No. 16 was omitted in error, but was intended to pass and was conveyed, the description being the "Utopia" plantation, known to embrace No. 16; the estoppel is pleaded, claiming to arise from the fact that the lot was inventoried when James Billiu died as part of "Utopia," and hence plaintiffs, his widow and heirs, can not now dispute the lot was such part; the answer prays for judgment against plaintiffs; for the maintenance of the prescription and estoppel pleaded, and that in the event the court should hold the description in the acts do not suffice in terms to convey the property in dispute, that the description be reformed so as to make that conveyance accord with the intentions of the parties.

From the judgment of the lower court in favor of plaintiffs, defendant takes this appeal.

In 1855 James Billiu acquired the plantation, of which the lot No. 16 was part. The description was a front tract of four and a half arpents by forty arpents, and a back tract made up of lots 17, 26, 27, 28, 16, 18 and 19. The lot 16 here enumerated is that in dispute. Subsequently Billiu conveyed one-half the plantation to J. S. Perkins, and then begun, as we gather from the record, a planting partnership between the joint owners. In 1860 Billiu and Perkins

mortgaged the property to their factor, West, Renshaw & Cammack, for sixty-five thousand dollars, the name given to the property in the mortgage act being the "Utopia," and the description embraced lot 16 as part of it. Later, the wife of Perkins died; the one-half of the plantation acquired by her husband, treated as part of the community, was sold to settle her succession, and by the adjudicatee conveyed to Clara L. Blanchard, the second wife of J. S. Perkins. James Billiu died in 1865. His property, including the one-half of Utopia, was inventoried, the description naming lot 16 as part of it, and was ordered to be sold, the Canal Bank, holder of the mortgage note of 1860, provoking that sale to pay the mortgage debt. At that sale, made in 1875, Marion W. Billiu, one of the sons of James Billiu, became the purchaser; but in the sheriff's deed the "Utopia" is stated to be composed of lots 17, 18, 19, 26, 27, and 28, lot No. 16, the one-half of which, and the other lot, though ordered to be sold, not being mentioned in the deed. In 1882 Mrs. Perkins conveyed to Marion W. Billiu the undivided half of the "Utopia;" but, in enumerating the lots, No. 16 was not named. This contention arises out of the sheriff's deed and the sale of Mrs. Perkins. The half of the Utopia of Marion W. Billiu was sold under the same description contained in the sheriff's deed; his vendor reconveys, reserving the usual mortgage; under the foreclosure of that mortgage the property is purchased by Weill, the author of defendant's title; then Weill sells, purchases again under the foreclosure of his mortgage, and finally, in 1892, Weill sells to defendant. In all these sales, beginning with the sheriff's deed in 1875, the property is designated as the Utopia; but No. 16, though always from an early period forming part of it, is not mentioned. The defendant claims it passed by manifest intention and necessary implication.

This intention, it is claimed, is manifest from other facts disclosed by the record. The purchase of Marion W. Billiu at the succession sale of his father's property was in the interest of his mother and his co-heirs, as shown by his counter letter. The purchase by him from Mrs. Perkins was in the same interest. The counter letter is followed by the sale of the family to him of the one-half purchased at the succession sale. Thus placed in his father's position in reference to the partnership property, the partnership begun in his father's lifetime continued between him, representing his family, and Mrs. Perkins. In January, 1882, there is on the record a sale of the

Gladdish et al. vs. Godchaux.

one-half of the Utopia from Marion W. Billiu to Cammack, from Cammack back to Billiu of the property. On the same day the conveyance is executed from Mrs. Perkins to Billiu of one-half of her interest in the Utopia plantation, and a conveyance from Billiu to Mrs. Perkins of the half of the Mary plantation, part of the partnership property, the interest of his father in the Mary having been acquired by Marion Billiu along with the interest of his father in the Utopia. Dealing with a complicated record, in which scant admissions are substituted for the acts, we may not be entirely accurate as to the details of this labyrinth of conveyances, but we appreciate the general tenor of the acts and understand the significance attributed to them as denoting a settlement of this planting partnership. That this settlement was proposed is also disclosed by oral testimony produced by defendant. On the strength of all this, the conclusion is deduced in the argument for defendant that this settlement being intended, Billiu conveying to Mrs. Perkins all his interest in the Mary, one part of the partnership property, we are to read into her conveyance of the interest she had in the Utopia, also part of the partnership property, lot No. 16, though not mentioned in the act. On this theory rests the defendant's contention, that already divested by her conveyance of 1882 of her one-half in the Utopia, her subsequent sale in 1892, under which plaintiffs claim, passed nothing.

The plaintiffs objected to all parol for the purpose of showing that any interest in lot No. 16 not mentioned in the deeds was intended to be conveyed. The alleged error of the acts in not mentioning this lot was introduced in the supplemental answer. If we are to understand the filing of this supplemental answer is disputed, we dispose of that objection. Error must be specially pleaded. The allegation might have accompanied the other defences on the original answer. Not changing the issue of the ownership of lot 16, but simply amplifying the title relied on by defendant, we think defendant was entitled to the amendment. Code of Practice, Arts. 419, 420; 2 Hennen's Digest, 1182, No. 9; *Payne vs. Railroad*, 38 An. 164.

Nor have we any doubt under an allegation of error an omission in an act may be supplied. The power to reform and correct acts so as to make them conform to the real intentions of parties, when, through inadvertence or accident, the purpose is not expressed, is of frequent exercise in courts of equity, and our courts administer the same relief. Of course, the proof of error must be clear. Nor do we appreciate that this relief can not be afforded defendant because the

alleged error occurred in the written acts prior to his own title. The plaintiffs claim in part as heirs of James Billiu. If, in our opinion, his title was divested by the sheriff's sale of 1875, any testimony tending to show that divestiture and the error in the sheriff's deed is admissible against his heirs. The plaintiffs claiming the other half as the assignees of Mrs. Perkins are bound, by any testimony that would bind her, to show that she had conveyed lot No. 16. See 1 Story's Equity Jurisprudence, par. 152; Palangue vs. Guesnon, 15 La. 311; Robert vs. Boulet, 9 An. 29; Bryan vs. Wisner, 44 An. 832; Vignie vs. Brady, 35 An. 560; Vial vs. Moll *et al.*, 37 An. 203.

On the question of the divestiture of the title of James Billiu, we have the succession sale of all his property, including his one-half lot No. 16, then forming part of the Utopia plantation, inventoried, and ordered to be sold. There is the act of mortgage of 1860 of the Utopia, enumerating specially this lot No. 16, under which mortgage the sale was made. It was the Utopia plantation by name and under that order of sale that Marion W. Billiu became the adjudicatee. It is to our minds clear that he became the owner of the undivided half of lot No. 16 by this adjudication. If he had stood before the court in 1875 exhibiting the inventory, the act of mortgage of 1860, the order of sale of the property embraced in that inventory and the mortgage and the *proces verbal* of the sale of the Utopia, the court would have promptly corrected the manifest error in not enumerating lot No. 16 as part of the Utopia. There is, too, on this branch of the case the record that the succession of James Billiu was closed, the debts paid as far as the property would suffice, with the petition from the executors importing to our minds the significance that all the property of his succession had been disposed of in course of administration. The heirs of Billiu appear to have acted on the theory that nothing remained of the succession property. It was not until 1892, some years after the close of the estate, that the form of the sheriff's deed suggested this suit. In our opinion the title of their ancestor was divested. That is enough to dispose of their case. They are without interest to question whether the subsequent conveyances of the Utopia plantation, by which the property had been known for years, did not convey lot No. 16 as part of it. We think it did. Levy vs. Ward, 33 An. 1033; Dickson vs. Dickson, 36 An. 870; Bryan vs. Wisner, 44 An. 832.

As to the undivided half of Mrs. Perkins, claimed by plaintiffs, as her assignees, the case, in our view, is different. She remained indis-

Gladdish et al. vs. Godchaux.

putably the owner of her one-half at and before the succession sale of James Billiu. Her conveyance to Billiu is in 1882. It mentions the Utopia plantation, but omits lot No. 16 in enumerating the lots. On the face of that conveyance she remained owner of one-half of lot No. 16. How can we assume that she intended to convey her interest in that lot. The defendant undertook to show her intention in that respect. It is contended the various acts of January, 1882, was a settlement of the partnership denoting her purpose to convey all her interest in all land ever belonging to the Utopia, and necessarily including her part of No. 16. But her conveyance omits No. 16. The parol proof administered, her own and the testimony of John W. Billiu, fail, in our view, to show any intention other than that we can deduce from the acts. She testifies in effect she committed everything pertaining to that settlement to her husband, and has no knowledge on the subject. Her husband was dead. John S. Billiu adds nothing of benefit to defendant. What he does say of any pertinence makes, in our view, against defendant. No reference, he says, was made to No. 16 in that settlement. No change in boundaries occurred, he testifies, till 1882, rather implying that her part of No. 16 was then reserved to her. At best, the defendant has made it probable she intended to convey her interest in that lot. But the written title, omitting that lot, must stand unless the error is established. We can not overthrow the title to real estate on any theory of probable intent. In respect to the Billiu one-half we have the act of mortgage enumerating No. 16 as mortgaged, the order of sale directing the sale of the property. There is the presumption the sheriff followed the order. The conclusion on this basis alone is that not naming No. 16 in his deed is a mere inadvertence. We have other evidence besides to show that error. No such or any basis is, in our view, supplied as to the Perkins one-half.

There is no issue in this case as to rents and revenues reserved, we presume, for further proceedings.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed in so far as it decrees the plaintiff to be the owner of lot sixteen, claimed in plaintiff's petition, and it is now adjudged and decreed that plaintiff, Mary E. Gladdish, be decreed to be the owner of one undivided half of said lot; the issue as to rents and revenues is reserved, costs of the lower court to be paid by defendant, those on the appeal by plaintiff.

INDEX.

ABSENTEE.

See Minors; Pleading and Practice.

ACCEPTANCE—RENUNCIATION.

A “judgment by default” did not conclude the parties and cut off a renunciation by them of their mother’s succession—such a judgment not being definitive in its character.

The tacit admission resulting from the judgment by default disappeared at once upon the filing of the disclaimer without the necessity of a formal setting aside of the default by motion.

It was not necessary, in order to prevent judgment being rendered against these parties as heirs of their mother, that they should have renounced her succession by notarial act; the paper filed by them sufficed for that purpose. Defendants owed no duty to plaintiff—were not its debtors and could not be forced against their will to accept the succession.

The parties cited having, however, not disclaimed being heirs of their brother, but allowed a definitive judgment to be given against them as such, must be held to have accepted his succession and they as such heirs represent directly an interest in the interest formerly held by him.

The immediate heirs of the mother having renounced her succession and there being no others known, plaintiff and the court are warranted in acting upon the assumption that the interest which had been cast upon the mother had devolved upon the sister and the three brothers by reason of accretion and the indivisibility of their acceptance of their brother’s succession.

A sale by licitation made contradictorily with the parties now before the court will convey a legal title to the purchaser..

Bank vs. Choppin et al., 630.

ACTIONS.

See Pleading and Practice.

ADMINISTRATION—ADMINISTRATORS—EXECUTORS.

When payments exonerate the estate from legal charges the executor must show that they are unfounded and excessive, or they will be allowed as a credit on the curator's account.

Interdiction of Onorato, 73.

When a testator directs in his will that his immovable property be sold by his executor, an order of sale rendered thereon for the sale of the property is valid.

If the executor dies pending the proceedings for the sale, his death does not have the effect of annulling the order or arresting the sale.

It is the law that an executor's authority is confined to the execution of the will, and that he can only sell property, movables first and thereafter immovables, in default of funds to pay debts and legacies. But the Code, Art. 1669, makes an exception when the executor is directed to sell immovable property by the will.

The rights of the widow in community and the heirs of age are fixed at the testator's death, and these rights are personal to them. If they make no objection to the sale of the property directed by the will the adjudicatee has no cause of complaint. They waive their personal rights by making no opposition to the execution of the will, and the order of sale by the court is a complete protection of the adjudicatee's title.

Succession of Massey, 126.

The court having recognized the validity of the judgment probating the will of Myra Clark Gaines, pronounced in New York, in which was the domicile of the testator;

The legatees and creditors being before the court and applying to be paid here;

The assets of the succession are ordered to be distributed here, and legacies, creditors and all charges are ordered paid from the funds on hand.

Succession of Gaines, 252.

Where, after a succession has been placed under a regular administration, an olographic will of the deceased is found bequeathing the usufruct of certain specific property to a particular person, and this will is, at the instance of the legatee, offered for probate by an attorney at law and probated over the opposition of the heirs and the administrator, remuneration for such

ADMINISTRATION, Etc.—*Continued.*

services must be sought not from the succession, but the particular legatee. *Succession of Morvant*, 301.

That the executor, being charged with the duty of seeing that the proper security should be given by the usufructuaries under the law, is entitled to commissions upon the appraised value of the property so bequeathed. *Id.*, 302.

The actions of an administrator should be subjected to full investigation. Whenever they appear of questionable legality ratification of the same should be established by very clear proof. Whenever practicable, light should be thrown in aid of right.

Succession of Troxler, 738.

Where a person in his will bequeaths to his wife certain property and appoints her as his executrix without seizin, it is her duty, in filing her final account, to account for all property left by the testator at his death, including that specially bequeathed to her, and pray that she be authorized to dispose of the same in such manner and to such persons as she believes should be made under the terms of the will and the law. The heirs must be cited and made parties to this account and demand, and they have the legal right to make available all objections which they have to the same by oppositions thereto. Objections to the special legacy to the wife as being in excess of what could be bequeathed to her by her husband can be urged in that way, as can also all objections to the items of the inventory, as being either appraised too high or too low. C. P. 1004.

Succession of Von Hoven, 911.

In a succession where the judgment of the court recognizes a party as sole heir, and in pursuance of this judgment and under order of the court the administrator pays the balance of the succession, after paying debts, to said heir, heirs subsequently appearing can not compel him to account to them, and answer personally for said sum in default of filing said account.

Baron et als. vs. Baum, 1099.

A disposition by last will that legacies to minors should be held and administered by the executrix of the deceased and not paid until the minors attain majority or are emancipated, imposes the trust on the executrix to hold and administer the legacies as directed

ADMINISTRATION, Etc.—Continued.

by the will, and that trust continues, notwithstanding the discharge of the executrix granted on her petition.

This trust continuing, there is no basis for this court to direct the payment of the legacies to the dative tutrix of the minors.

Calvert, Tutrix, vs. Boullemet, 1132.

Where the community is dissolved by the death of the wife her testamentary executor has not the right to take possession and control of the property of the community on the ground that the settlement and liquidation of the community is to be conducted in the wife's succession by and through the administration of the executor.

Hewes et als. vs. Baxter et als., 1280.

Under Sec. 10 of the Revised Statutes any creditor or person interested has the right to require that administrators shall give new or additional security for the faithful performance of their office as often as once in every twelve months, and oftener if the court, on motion to that effect, may judge it to be necessary. The tutrix of a minor who is an heir in a succession, by reason of representation of her deceased father, is authorized in her capacity as tutrix to make this motion, although she be also administratrix of the succession of the father. The minor is a "party interested" in the matter.

Where, since the administrator of a succession qualified as such under Art. 1048 of the Civil Code, the United States Court of Claims has approved a claim against the government for over ten thousand dollars, the recognized claim is a credit of the succession, and the District Judge acted correctly in ordering an inventory to be made of the same and the administrator to give additional security based upon it. The administrator has no right to have the giving of the new bond postponed until Congress shall have made an appropriation to pay the claim.

The administrator has no right to limit the amount of the new bond so as to correspond with the share which the minor may have in the new asset by reason of the other heirs not having asked or exacted additional security.

Estate of Hardy, 1309.

See Homestead; Husband and Wife; Community of Acquets and Gains.

AGENCY.

The ratification of the act of an agent can not be divided and applied to one part of the act and excluded from the other; it is entire or nothing.

Milling Co. vs. Flower, 315.

If the agent of the maker of a mortgage note has no funds of the principal in his possession there is no reason why, on the request of the principal, he can not buy for his own account the mortgage note and hold it as security for the amount advanced for the principal.

If the agent has money of the principal in his possession and purchases the note, and makes a payment thereon with the funds of the principal, this payment will be considered as having been made by the principal, and the mortgage will be extinguished by confusion to the amount of the payment.

A mere indorsement of the note carries with it the mortgage security.

The offer of testimony to show in what manner the agent acquired the note is not a contradiction of the indorsement when it is restricted as to whether the agent purchased the note for his own account with his funds, or for his principal with the latter's funds.

Gumbel & Co. vs. Boyer and Sheriff, 762.

ALIMONY.

See Divorce.

APPEAL.

When the District Judge, on application made to him by a defendant in injunction, permits the bonding of the injunction, plaintiff has the legal right to apply for a suspensive appeal from the order to that effect. Should this be denied him, he has the undoubted right to have tested in the Supreme Court the question whether the judge was warranted and justified in this refusal. On such an inquiry the court has necessarily to determine whether the judge's discretion, which only extends legally to cases wherein the dissolution of the injunction would not work irreparable injury, has been legally applied or not. If the court finds it has not, the relief will be granted, otherwise relator takes nothing by his application. As has been said several

APPEAL—Continued.

times by the court, each case must stand or fall upon its own special facts and circumstances. *White vs. Cazenave*, 14 An. 57; *Blanc vs. Murray*, 36 An. 167.

State ex rel. Violett vs. Judge, 83.

A motion to dismiss an appeal on the ground that the necessary parties have not been cited will be denied when all the parties to the record interested in maintaining the judgment are parties to the appeal.

Denegre vs. Mushet, 90.

The court of the first instance having acted upon the resolution of the company consenting to the appointment of a receiver, a suspensive appeal will not lie from the decree of appointment without proof that the resolution was *ultra vires*, or that it was, in other respects, illegal and improper.

State ex rel. Brewing Company vs. Judge, 100.

The remedy to correct the alleged illegality in the appointment of a receiver is by rule to set aside and vacate the order of appointment, and, if the rule be denied, to appeal from the decision.

Id.

The order appointing the receiver in effect sustains the *status quo* of the corporation, and was issued to prevent, not to cause, injury.

Should it become apparent that the injury is actual or threatening, the appeal will be allowed upon proper application.

State ex rel. Gaiser vs. Judge, 110.

State ex rel. Fox & Searles vs. Judge, 114.

Where the issue in a case is not the right of ownership of specific property, but of the possession thereof, it is the value of the latter right which determines the jurisdiction on appeal of the Supreme Court.

State ex rel. Humphreys vs. Richardson, 133.

Lea vs. Orleans, 144.

The authorities are numerous that when an extension of time has been granted, the appellant is not entitled to three days of grace to file his transcript. *Cane vs. Caldwell & Kahn*, 28 An. 790; *Bienvenu vs. Insurance Company*, 28 An. 901; *Von Hoven vs. Von Hoven*, 43 An. 1170; and other cases.

Archer et als. vs. Gonsoulin, 144.

APPEAL—Continued.

The records of the clerk's office of the Supreme Court may be used in that court, on appeal, to complete the record of a transcript, when it is manifestly a correct transcript of the proceedings in the court of original jurisdiction, and that another transcript would only be a second copy of the proceedings.

Clark vs. Comford et al., 383.

Two separate appeals were taken at different times from one judgment.

The reasons and decree in deciding the issues on the first appeal are determinative and will be followed in the second appeal. *Id.*

In case the record discloses that a third person appealing from a judgment between other parties has no interest in the appeal, that the judgment appealed from in no way aggrieves him, and does not, as to him, form *res adjudicata*, the appeal will be dismissed on proper motion timely made.

City vs. Dufossat et als., 398.

The decision of the District Court upon each of the claims, carried on the tableau, is a separate judgment in favor of each creditor. This judgment must remain undisturbed, if the creditors accept it as correct and do not choose to appeal from the judgment reducing the amount. The syndic is without authority to appeal, for he is without interest and is not aggrieved.

The appellees whose claims were reduced being quiescent, the syndic is without authority to prosecute an appeal in their behalf.

Chapotin vs. Creditors, 412.

The receipt by the appellant of a portion of the amount decreed to him by the judgment is acquiescence in the judgment and defeats the appeal. Code of Practice, Art. 587; 3 An. 115; 4 An. 150; 7 An. 233; 18 An. 64; 32 An. 947.

Nor is this acquiescence at all affected because the appellant, receiving part of the amount of the judgment, undertakes to reserve his appeal. The reservation can not avoid the effect the law attaches to the acquiescence in the judgment. 18 An. 64.

Flowers vs. Hughes et al., 436.

On motion to dismiss an appeal, on the grounds of acquiescence in and voluntary execution of the judgment, this court will not determine the question on *ex parte* affidavits filed first in this

APPEAL—Continued.

court in the absence of admission of their truth by the appellant, but will remand the case to the lower court, in order that evidence may be heard and a record returned to this court for final action.

Bank vs. Lanauz et al., 467.

Brown & Co. vs. Haynes, Administrator, 1230.

An order directing sale of the property of a corporation which is in the hands of a receiver may be suspensively appealed from by the corporation, on a bond sufficient to cover costs of appeal—the property being *in custodia legis* and under the control of an officer of court.

Any additional bond which the presiding judge may require as security for such damages as may accrue during the pendency of the appeal is not authorized by law, and can not be imposed as a condition precedent to the appellant's right to exercise his appeal.

State ex rel. Brewing Company vs. Judge, 490.

A transcript of the record of appeal not filed on the return day, nor within three judicial days following the return day, the appeal will be dismissed.

State vs. Rutledge, 548.

Appeals from sentences and judgments in the Criminal District Court of the parish of Orleans must be taken in conformity with the statute regulating appeals in criminal cases.

Judgments forfeiting bonds by said court are controlled by the same statute. *State vs. Burns*, 38 An. 363.

The judgment of forfeiture was rendered January 17, 1893; the appeal was taken January 15, 1894. The appeal is dismissed.

State vs. Alexander, 551.

Costs follow the judgment, and therefore it is not necessary for parties to whom costs are due to appeal.

When the court orders costs to be taxed against a defendant the plaintiff has not such an interest in the matter as to be entitled to notice of the granting of the order. If the party to whom the costs are due appeals from the order it is not necessary to make plaintiff a party thereto.

Succession of Gaines, 695.

APPEAL—Continued.

Where the issues involved are as to the ownership of a certain fund, and the District Court renders a decree in favor of plaintiff, from which a devolutive appeal is taken by defendants, and the court afterward orders the fund distributed among those to whom it was adjudged in their application, the fund being on deposit in the court and under its control, no suspensive appeal can be taken by defendants from the interlocutory order of distribution. Such an appeal would arrest the execution of the judgment originally rendered, which can only be done by defendants by a suspensive appeal from it.

Durward et als. vs. Jewett et als., 706.

In such a case no question of distribution of the fund among those to whom it was adjudged by the decree is presented. The judgment not having been suspensively appealed from must be executed. *Id.*

The appellant, in good faith, seeking in this court the determination of a question affecting his rights will not be made to pay damages, merely because the supposed questions admitted of easy solution without appeal.

Palmer vs. Kuhn, 906.

On appeal from a judgment of the Recorder's Court of the City of New Orleans finding a person guilty of having violated an ordinance of that city, and imposing upon the party charged, as provided for in the ordinance, a fine of twenty-five dollars, or on default of payment imprisonment for thirty days, the case is not before the Supreme Court generally, but only upon the restricted issue of the constitutionality and legality of the fine and penalty imposed by the municipality; therefore it can not, when that remedy is resorted to, examine into and pass upon the question as to whether the person who presided at the trial and rendered and signed the judgment was legally authorized so to do; for the same reason it can not grant relief when the complaint made by the accused is that under the charge as made, and the evidence as received, the judge has sentenced him, not under an illegal ordinance, but without the authority really of any ordinance at all, and therefore without warrant of law.

State vs. Courcier, 908.

APPEAL—Continued.

A judgment which may be provisionally executed, notwithstanding an appeal has been taken therefrom, is not susceptible of a suspensive appeal.

That proposition involves a contradiction in terms.

State ex rel. Ziegler vs. Judge, 932.

There is no provision in our law permitting the filing of the record of appeal "*in forma pauperis*." The record must be stamped or the cause can not be heard. Constitution of 1879, Art. 145; Act No. 136 of 1889, Sec. 1, pars. 441, 10, 22.

Reddick vs. White, 1198.

It is the duty of the appellant, not that of the clerk of the District Court, to file the transcript of appeal.

An appellant has the right immediately after the perfection of an appeal to demand a transcript of the case from the clerk, and the clerk must furnish it within a reasonable time after demand, otherwise he can be compelled to do so by *mandamus*. If, however, being in default, he, before a *mandamus* is taken out, tenders to the appellant a transcript duly certified, the appellant can not decline to receive it and *mandamus* the clerk as if he had refused absolutely to furnish it, on the ground that the transcript tendered was so defective that appellant's appeal might be dismissed on account of its imperfections. It is the duty of the appellant to receive and file the certified record and protect his appeal by easy and familiar methods. Appellant can not collaterally raise and have determined on a *mandamus* the correctness of the transcript so tendered. Questions of that character must be raised and determined under different circumstances and conditions. When the clerk, under the circumstances stated, being ordered to file a transcript on the first day of the term of this court, or show cause to the contrary, does so on the day named, an application for a *mandamus* based upon the contingency of a refusal must be dismissed at relator's costs.

State ex rel. Comeau, Administrator, vs. Clerk, 1289.

An order of appeal may be taken at any time within one year, to be computed from the day on which final judgment is rendered, but the appellant must file the transcript in the court of appeal on the return day of the appeal.

Comeau vs. Miller, 1324.

APPEAL—Continued.

An opposition without bond to a seizure and sale presents the issue only whether the notes on which the writ issues have been paid, or obtained by fraud, or other defences specified in Arts. 738, 739 of the Civil Code of Practice, exist; hence, when the notes are for an amount less than required to give this court jurisdiction the appeal will be dismissed, although the opposition claims judgment for a larger amount against one not before the court and against whom no judgment can be given. 15 La. 353; 4 Rob. 490; 29 An. 124; 30 An. 1163; 31 An. 112.

Koch vs. Godchaux, 1382.

In case a judicial sequestration, as an incident of a real action, is dissolved, and the plaintiff is left under the restraint of an injunction forbidding him to collect rents *pendente lite*, there is such probability of resulting injury therefrom that he is entitled to a *mandamus* to compel the allowance of a suspensive appeal from such interlocutory decrees,

State ex rel. Lamothe vs. Judge, 1407.

Where the course of a plaintiff on the trial, the nature of the cause of action and the evidence adduced in the lower court all go to show that plaintiff could not have seriously believed the demand for damages claimed by him would be sustained, the allegations of his petition as to the amount of damages suffered by him are without force in testing the question of jurisdiction on appeal.

Lea vs. Orleans, 1444.

Where five persons unite in an action claiming ten thousand dollars damages against another for malicious prosecution and arrest, based on an affidavit charging them together with a violation of the 758th section of the Revised Statutes, the defendants against whom the judgment has been rendered properly appealed the case to the Supreme Court.

Armstrong et als. vs. Railroad Company, 1448.

ASSESSMENT.

An assessor can not bring together a number of distinct properties belonging to different individuals—fix a single valuation upon them as a whole, and, ascribing the ownership of them all to one of the owners, assess taxes against him to the full amount of the assessment on that false assumption.

ASSESSMENT—Continued.

The act of the tax collector in advertising and adjudicating said properties in block to the State in enforcement of the delinquent taxes thereon so assessed, was without legal authority.

Howcott & Ransdell vs. Levee District, 322.

When the fact is known that the owner is dead and his succession is opened, the assessments should be made in the name of his "estate."

The certificate of a tax collector to the assessment roll applies, under the terms of the statute, only to those who are notified by publication.

A certificate to establish notice given by mail to a non-resident taxpayer will not be held conclusive. It must yield to absolute proof.

Montgomery et al. vs. Land and Lumber Company, 403.

The law does not contemplate that the assessor shall test titles in order to make assessment of the property.

A *prima facie* title suffered to remain unquestioned on the official records, taken in good faith as a basis for the assessment, is a compliance with the requisition of the statute regarding assessments.

Augusti vs. Citizens Bank, 530.

In the assessing of the shares of stock under Sec. 27 of Act 106 of 1890, it is no ground for annulling the assessment when the list of shareholders appear in a different part of the assessment book from that in which the assessment is first noted, if there has been a substantial compliance with the law in assessing the shares to each stockholder.

The assessment book may not be conveniently and artistically arranged, but this does not injure the bank, as it is only the agent of the shareholders for paying the tax.

Castles, Liq., vs. City et als., 542.

Under the revenue law of 1890 real estate, with the buildings, improvements and appurtenances, are directed and required to be separately assessed from the machinery, apparatus, etc., appertaining to a jute factory thereon placed. Notice having been served upon the parish board of assessors, to the effect that the property of a manufacturing establishment is exempt from

ASSESSMENT—Continued.

taxation, can not serve as a demand for the reduction of an excessive assessment.

The filing of an assessment roll in the office of the recorder of mortgages acts as a lien upon each specific piece of real estate thereon assessed, and the same property becomes subject to a legal mortgage after the 31st day of December of the current year.

Behan vs. Board of Assessors, 870.

Act No. 106 of 1890, Sec. 26, requires in matters both of reduction and increase of assessments by the Committee of Revision of Assessments that the "Board of Assessors" should be heard before that committee reaches any determination in the premises. A formal notice such as is given to the individual taxpayer should in each case of proposed alteration be served upon that board, calling upon it to show cause why the alteration should not be made. It is the duty of the board to present a written answer in each case, giving its views in respect to the same explicitly and in detail. It is the duty of the committee to receive and file these answers, and after taking each into consideration, in connection with such other facts relative to the subject matter as may be before it, to reach a separate conclusion in each case and annex these answers to its report and forward them as part of the same to the Common Council.

The Committee on Revision should keep a record of all its proceedings, and of the evidence upon which it acted. The work of the committee is only by way of inquiry and investigation—its action is not final—its recommendations are submitted for approval or rejection by the council. It is the action of the council, not the committee, which determines what should be done with the special assessments designated. The council is expected to bring to bear both knowledge and judgment in its conclusions, and not merely register those of the committee, and this can not be done unless the latter communicates to it its reasons and the evidence upon which it acted. The report of the committee, both as to increase and reduction of assessments, should have attached to it the affidavits of a majority of the committee "that the valuations fixed by it are the valuations provided by law."

ASSESSMENT—Continued.

In reporting back, at a date not later than the 18th of April, as required by law to the assessors the report of the Committee on Revision, the action of the council on that report must be simultaneously reported.

Gaslight Company vs. City, 1146.

It must be a clear case to authorize the court to set aside an assessment for local improvement imposed by legislative authority and hold in opposition to the legislative judgment that lands assessed for the expense of improvement can never be benefited by the proposed improvement; this is not such a case. 8 An. 472; 12 An. 517; 2 An. 186.

Hill et al. vs. Sheriff et al., 1569.

The land between the levee and the river, though submerged at the high stage of the river, is the property of the riparian proprietor, subject to public uses. Civil Code, Arts. 455, 457; 10 La. 19; 11 La. 170; 8 Rob. 211.

Such land, if used by the riparian owner or from which he derives a revenue, is properly assessable and subject to taxation.

Mathis vs. Board of Assessors, 1570.

See Exemptions.

ATTACHMENT.

An affidavit by the attorney for plaintiff, that from information received from the parties affiant believes the allegations in the petition to be true and correct, the petition stating the debt and all other requisites, is equivalent to swearing to the knowledge and belief of the affiant. The law does not exact that the word "knowledge" shall be used, but is satisfied if an equivalent is employed, and information received, believed to be true, is knowledge. Code of Practice, Arts. 216, 244.

Dinkelspiel's Sons vs. Woolen Mills, 576.

The intent to defraud must be established to justify an attachment. In an attachment not actuated by malice, only actual damages will be allowed.

Bloch vs. Creditors, 1337.

ATTORNEY AT LAW.

The substance of our jurisprudence is, that a certain degree of sanctity attaches to the act of an attorney at law as an officer of court, which raises a legal presumption that it was authorized, and imposes on the client denying his authority the duty of supporting his denial with an oath, in order to overcome that presumption and put the opposite party to the proof of his authority.

But this rule is not exclusive of all others; and such an oath is not a condition precedent to the administration of any proof on the part of the party who denies the authority of the attorney. It is permissible for such party to go on the stand and testify on the subject.

Bender vs. McDowell, 393.

An attorney at law is presumed to know what transpires in the litigation in which he is employed, so far as it affects his interest. If he permits his associate to claim docket and deposition fees in the Federal courts, and an order in his favor is rendered for the same, the party owing the fees will be protected in paying according to the terms of the order.

Succession of Gaines, 695.

AUCTIONEER.

The adjudication by the auctioneer of the property to the purchaser is a complete title. No other is necessary and essential to vest title in the adjudicatee. The auctioneer who made the sale can make the deed and receive the price if no opposition is made by the executor, or in his absence.

Succession of Massey, 126.

BANKRUPTCY.

The surrender in bankruptcy under the act of Congress of 1867 carries all the property of the bankrupt to the assignee, and no action upon the property or any specific part of it can thereafter be maintained by the bankrupt or by any one claiming by purchase from them, unless by a new title acquired since the bankruptcy. Bankrupt Act, Sec. 14; Bump. on Bankruptcy, 10th Ed., 247; 44 An. 444.

Hence, when the petitory action by the bankrupts or their transferees is avowedly for property thus surrendered in bank-

BANKRUPTCY—Continued.

ruptcy, and asserting title existing at and before the bankruptcy, and which necessarily passed to the assignees, the action can not be maintained. *Ibid.*

No court can enforce the demand of the bankrupt for property belonging to him at the date of his bankruptcy, which, by the law and his oath to a full surrender, passed to his assignees, unless the property is claimed by a new title from the assignee. 2 Hennen's Digest, *verbo* Illegality of Contract, p. 1007; 31 An. 577.

Chachere et als. vs. Block, 1386.

BANKS—BANKING.

The relations between a bank and its customers are those of creditor and debtor. The moneys are not specially deposited to be identically restored. They go into the mass of the bank's money with the understanding that they might be used and should be the basis of items of a debit and credit account.

Clason & Co. vs. City, 1.

BONDS OF THE STATE.

In order to constitute a valid security, any bond or negotiable obligation of the State must be issued on authority of the Constitution and statute law of the State; and the powers and duties of officers and agents of the government, whether Federal or State, are defined by statute, which is notice to the world of the limitations placed upon their authority.

State vs. Hart, 40.

It appearing that constitutional bonds which had been prepared by the proper officers appointed by law for that purpose, possessing all the *indicia* of genuine bonds of the State, had been delivered into the custody of the State Treasurer for the purpose of making an exchange thereof for consolidated bonds of the State, in pursuance of the provisions of the Constitution and law, and that the Treasurer had fraudulently and illegally entered in the blank spaces or shields upon said constitutional bonds numbers purporting to indicate the numbers of the consolidated bond surrendered in exchange therefor, and that he had subsequently and surreptitiously issued and placed same into circulation as *bona fide* and genuine obligations of the State, same are fatally

BONDS OF THE STATE—Continued.

stricken with absolute nullity in their inception, and antecedent to their issuance, and being placed in circulation as unconditional promises of the sovereign to pay. Such paper is void in the hands of any holder, as it is the settled rule of the law merchant that when it is shown that the instrument was given for a consideration which, by statute, is declared void, the original taint follows it, and it is void in the hands of every holder, however innocent, and that no party can enforce a negotiable instrument if it be not genuine or if it be executed by a party incapable of entering into the contract in which it was given. *Id.*

It is the settled jurisprudence of this court that the series of consolidated bonds of this State known as Agricultural and Mechanical College and Seminary bonds are illegal and void, having been declared null by the Constitution of 1879; and this nullity may be reached and declared in the hands of any third holder, however innocent in their acquisition. *Id.*, 54.

Any one who shall collect from the State interest on coupons clipped from said bonds, after he has become advised of the illegality of such bonds, is under obligation to make restitution to the State of the amounts thus paid by the State in error.

In case the State Treasurer, having official custody and possession of said illegal bonds, shall fraudulently and feloniously convert same to his own use, and embezzle same, and collect unduly the interest thereon, any one aiding, assisting and conspiring with said treasurer in so doing becomes liable to the State for the amount of interest thus illegally obtained.

In case such treasurer shall pledge such illegal bonds for a loan of money, and the pledgee shall, after obtaining knowledge of their illegality, repledge them again to other persons, this state of facts constitutes no defence to the State's demand for possession of the bonds.

It is within the power of the court, under such a state of facts, to reach and declare the nullity of the bonds, and decree the right of the State to have same surrendered to her. *Id.*, 55.

State vs. Gaines, 425.

CAPTATION AND SUGGESTION.

A demand in nullity of a testament, on the ground of captation and suggestion, is barred by the provisions of Art. 1492 of the Revised Civil Code.

Zerega vs. Percival, 590.

The object of the compilers of the Code was to preclude all evidence of acts, conduct or motives of the testator antecedent to the making of the will, as exercising influence over the testamentary dispositions therein contained, but same were not intended to prevent the admission of proof of what occurred at the making of the testament.

Id., 612.

CITATION.

Under the provisions of Art. 1077, Code of Practice, any constable of the parish can serve the citation issued by a justice of the peace. If the constable is an interested party the citation must be served by another constable or the sheriff.

State ex rel. Police Jury vs. Justice of the Peace, 117.

The citation was addressed to the defendant partnership.

It was served on one of the partners, as if the partnership was a commercial partnership. It was not a commercial partnership *quoad* the lease to them of immovable property.

One of the partners bonded the property (provisionally seized) in the name of the partnership and received and disposed of the property in the name of the partnership.

The partnership is no longer in a position, legally, to invoke the want of citation of one of the partners.

Hollingsworth vs. Atkins Bros., 515.

See Successions.

CITIZENS BANK.

No sales, whether judicial, forced or voluntary, of property mortgaged to the Citizens Bank can affect its rights secured by the twenty-fourth section of its charter.

But as to taxes, it must be presumed that the Legislature did not intend to deprive the State of any prerogative, right or property, unless in terms expressive or inference irresistible.

CITIZENS BANK—Continued.

The property of the mortgage stockholders was always subject to taxation, and the remedy to compel payment remains unimpaired by the charter.

Augusti vs. Citizens Bank, 529.

The subscribers to the stock of the Citizens Bank of Louisiana, in subscribing not only subjected their property to mortgage, but incurred personal responsibility to the amount of the stock.

Proceedings against stockholders in enforcement of calls for contributions by means of executory process are in affirmance of the contract of subscription, and not proceedings of forfeiture, and they are governed by different rules as to their effects.

Any balance left unpaid on defaulted calls after sale of the stock and of the property mortgaged to secure it, made in executory proceedings, remains due by the subscriber, and an action lies to collect it.

The purchaser of the stock and property mortgaged to secure it, sold at a judicial sale made in enforcement of defaulted calls, is not responsible for the balance of the defaulted calls left unpaid after sale of the stock and property mortgaged.

The bank, in purchasing the stock and property mortgaged to secure the same, occupies no worse position than any other purchaser as to the unpaid balance on defaulted calls.

Succession of Thomson, 1074.

Where the owner of property seized and sold by the Citizens Bank in enforcement of calls for contribution on stock indebtedness, secured by a stock mortgage on the same, is not the owner of the shares of stock, but a third possessor not personally bound, his consenting to have executory proceedings directed against himself as actual possessor of the land, instead of against the original subscriber and his heirs, and his becoming the adjudicatee of the property, which was entirely for cash, did not make him a stockholder in the bank, and liable for future contributions. The sale of the stock under proceedings, directed against himself, was that of the property of a third person, without process of law, and an absolute nullity. The ownership of the stock remained after the adjudication where it was before—in the heirs of the original subscriber. *Pepper vs. Dunlap*, 9 Rob. 283; *Hare vs. Nevill*, 3 An. 326. *Bank vs. Irvine*, 1158.

CITIZENS BANK—Continued.

In selling the land entirely for cash on the defaulted calls for contribution, the bank exhausted its mortgage claims on the property (there being no loan mortgage), and the purchaser on paying the purchase price held the property free from mortgage.

Id., 1159.

CITY OF NEW ORLEANS.

Act 116 of 1888 delegates to the City Council the authority to prescribe by ordinance "the manner private markets shall be kept."

If the power is not specially announced, the terms of the act cover an implied power in the council.

Under an implied power the reasonableness of an ordinance is a judicial question for the courts.

Without evidence establishing the unreasonableness of the ordinance the court will not decide that it is unreasonable.

The ordinance assailed by the defendant is reasonable, and within the power delegated; it is not oppressive, nor is it *ultra vires*.

State vs. Dubarry, 33.

Section 34 of Art. 135 of 1888 applies to street railways operated within the corporate limits of the city of New Orleans.

The City Council of New Orleans has the power to refuse the grant of a right of way through the streets of the city to a railroad operated beyond the city limits. It can also demand a price for the privilege, and it can also, if it deems the exercise of the power reasonable and proper, grant the right of way to a railroad operating their lines beyond the city into other territory, without compensation in money, but for other considerations.

In such a case, if the grant is accepted, it is irrevocable, except for a violation of their terms.

Railroad Company vs. City, 526.

In a suit by the alleged transferee of certificates or claims against the city, and the ownership of the transferee is specially denied, there must be evidence of the transfers executed by the parties to whom the amounts of the claims or certificates were primarily due. 42 An. 164; 43 An. 78.

CITY OF NEW ORLEANS—*Continued.*

A transcript, purporting to be from the books of the Comptroller, headed "Recorded in Comptroller's books in name T. Nolan, transferee," and followed by a list of names and amounts, offered to show the transfers of the claims and certificates by the parties named, does not establish ownership in the transferee, nor was it admissible for that purpose.

Wadsworth vs. City, 545.

The ordinance of the city of New Orleans requiring (under penalties in case of refusal) vendors of milk to the public to furnish gratuitously on application of sanitary inspectors samples of milk not exceeding one-half pint for inspection and analysis is not unconstitutional as forcing dairymen to furnish evidence against themselves, as taking private property for public use without compensation and without due process of law, as depriving them and their property of the equal protection of the law, and denying them protection in person and property from unreasonable searches and seizures and authorizing invasion of the same, without warrant founded on oath or affirmation.

The ordinance is not unreasonable, vexatious and oppressive, but a legitimate exercise of the police power for the public health.

State vs. Dupaquier, 577.

The City Council of New Orleans has the unquestioned authority to designate a place where perishable food may be sold, such as meats, fish, fruits, vegetables, etc.; to regulate the police of the market places, to lease the same, not for the purposes of revenue solely, but in order to maintain the market buildings and the police of the same. And for this purpose to authorize the lessee to charge a reasonable sum for stalls and space.

Because one raises his own produce gives him no right to sell it in violation of a city ordinance.

The city ordinance regulating the markets must give free access to the markets and afford proper facilities to persons who desire to sell goods which the ordinance requires to be exposed for sale there. The ordinance must be impartial, making no discriminations and creating no monopolies, and offering no serious impediment to trade.

State vs. Sarradat, 700.

CITY OF NEW ORLEANS—Continued.

Holders of claims against the city of New Orleans by the laws and ordinances under which the claims were created, entitled to payment only, from and out of the funds appropriated to payment of such claims, are not entitled to an absolute judgment against the city. City Charter, Acts of 1882, Sec. 64, Session Acts, p. 35; Act No. 38 of 1879, Session Acts, p. 57. Nor to interest on such claims, at least, unless there are funds in the treasury applicable to payment of such claims. 39 An. 981; 42 An. 3, 164.

Johnson vs. City, 714.

Fernandez vs. City, 1130.

The Board of Administrators of the University of Louisiana having contracted and agreed with the city of New Orleans, for a fair and adequate consideration, to educate five boys of indigent parents, to be appointed annually from the public schools of the city of New Orleans, said administrators and their successors and assigns can be kept to their agreement, and held bound to accept and educate the designated number of boys of indigent parents, when properly appointed.

The mayor of the city is incapacitated to enter into an act of compromise, and bind the city thereby, unless specially authorized by competent authority, and he can not, by acting under such a compromise, estop the assertion of the city's legal rights.

City vs. Board of Administrators, 861.

Plaintiff, holder of evidences of indebtedness, sues for judgment against the defendant.

There are no funds in the treasury for the years the debts are due.

The ordinance under which the defendant became indebted provides that the claims shall be warrantable and payable whenever there shall be money in the treasury to the credit of the appropriate funds.

It is the law of the contract binding the original claimants and their transferee.

The creditor has a right to a warrant on the treasurer, payable out of the appropriate fund.

Fernandez vs. City et al., 1130.

See Municipal Corporations—Police Power.

COMMUNITY OF ACQUETS AND GAINS.

Where a matrimonial community of acquets and gains exists and the wife dies and her succession is opened by the qualification of the husband as natural tutor of his minor children, issue of his marriage with the decedent, a creditor who has obtained a judgment on a community debt can not compel an administration of the wife's succession. His remedy is to proceed against the surviving husband and the community property.

Succession of Hooke, 353.

Where the title to community property is in the name of the wife, the heir who compromises his claim on the basis that the property belonged to the succession of the wife is without right to recover a second time part of the same property as coming to him from the succession of the husband.

Cochran vs. Cochran, 586.

The separate creditor of either spouse has the right, after the dissolution of the community, to have the community liquidated, and to subject, according to law to the satisfaction of his claim, the interest of his debtor thus ascertained. The separate creditor of the husband can not, after the community has terminated by the death of the wife and the rights of the parties have become fixed by that fact, deal with an undivided interest in any specific piece of property, if it belonged to the community, as if the husband had the absolute ownership of one undivided half thereof. He has not the right to seize directly an undivided interest in a specific piece of property, sell it, and apply the proceeds of the sale to the payment of his debt.

Rawlins vs. Giddens et al., 1186.

The administration by the husband of the paraphernal property of the wife is not displaced and the community deprived of the fruits merely because the husband receives a salary from the partnership of which his wife is a member, formed for the cultivation of the plantation, a part of which is her paraphernal property; the husband having the management of the entire plantation for the partnership, as well as for his wife. Civil Code, Arts. 2382, 2385, 2386; 18 La. 431; 6 R. 41; 12 R. 524.

Reddick vs. White, 1199.

COMMUNITY OF ACQUETS AND GAINS—Continued.

- . An action by the husband for alleged advances to and debts paid for such partnership, brought against the partner of his wife, is subject to the rule that one partner can not sue his copartner for specific sums, but only for a settlement of the partnership and for the balance with interest thereon found due on settlement. Story on Partnership, Secs. 217, 219, 221; 4 Rob. 445; 10 Martin, 433. *Id.*

When the community of acquets and gains is dissolved by a judgment of separation of property, the wife, in the absence of evidence on the subject, is presumed to have renounced the community. A wife who renounces the community stands as a third person *quoad* the community.

Spencer vs. Scott, Sheriff, 1210.

Where the wife of one of three joint owners of property dies, leaving a will in which she admits that the interest in that property standing in her name belongs to the community of acquets and gains, there is no necessity, in a suit brought by the other joint owners to effect a partition, that the surviving husband should be made a party in his capacity as testamentary executor of his wife, as well as personally and as tutor of his minor children, the wife's half of the property being left exclusively to the children.

Where the community is dissolved by the death of the wife her testamentary executor has not the right to take possession and control of the property of the community on the ground that the settlement and liquidation of the community is to be conducted in the wife's succession by and through the administration of the executor.

Hewes et als. vs. Baxter et al., 1280.

Where the husband, after the death of his wife, disposes in entirety of a particular piece of community property, each of the heirs of the wife has a right of separate action for the recovery of the undivided portion of the property belonging to him and which has been alienated. There is no obligation to make the other heirs parties.

COMMUNITY OF ACQUETS AND GAINS—Continued.

Vendees of community property sold by a husband after the death of his wife without authority can not drive the heirs of the wife to an action against their father upon the minors' mortgage. The property remaining in kind, they have a right to recover it in a petitory action. The recourse which minors have against their tutor's property was granted in their interest, and not as an instrumentality by which their rights could be overridden. Neither tutors nor administrators are permitted as a right to charge themselves with the value of the property belonging to the minors or to successions, and thus shift ownership from the minors and the succession over to themselves.

Where, in the settlement made by a tutor with his children, a particular piece of community property in which they have a right of ownership was accidentally, erroneously or intentionally omitted, no allusion is made to the same, the rights of ownership of the children in this property are not divested or affected by a receipt given by them as in full for the amount conveying to them as shown by the homologated account filed by their tutor, in which receipt it is consented that the evidence of the minors' mortgage on the tutor's property be erased. The account and the judgment of homologation extended only to the property and moneys therein covered.

The mortgage did not cover rights of ownership in property remaining in kind at the end of the tutorship, of which ownership the minors had not been legally divested.

LeBleu et al. vs. Timber Company et al., 1485.

At the dissolution of the matrimonial community by the death of one of its members, the title to community assets is vested jointly in the survivor and the heirs of the deceased, subject to the payment of community debts; and, as a consequence of the dissolution, the survivor can exercise no further control over the half that has vested in the heirs of the deceased, and can not lawfully encumber it with a mortgage in favor of his individual creditor, whose debt was contracted since the dissolution.

The theory of our law is, that a community of acquets and gains has, after the death of one of its members, only a fictitious existence, for the purpose of liquidation and settlement of community

COMMUNITY OF ACQUETS AND GAINS—*Continued.*

debts; consequently, when the surviving husband is the debtor of his wife at the time of her death, her heirs become *eo instanti* creditors of the community; and such survivor can not mortgage his half of the community property to secure his individual debts, otherwise than subject to the liquidation and settlement of the community and the payment of its debts out of its proceeds by preference.

The community creditors whose claims are unsecured by mortgage are entitled to be paid from the assets of the community by preference over the individual creditors, though the latter are secured by special or judicial mortgage.

Such mortgage of the share of the survivor is not null, but its enforceability is restricted to the *residuum* after community debts have been discharged.

That the community must be liquidated and settlement effected in the course of proper judicial proceedings, in order that the amount of such *residuum* be ascertained, and in such case the mortgagee of the husband will not be permitted to proceed in foreclosure of his mortgage until this *residuum* has been ascertained.

Newman vs. Cooper, 1485.

See Administrator; Husband and Wife; Marriage.

CONSTITUTION.

Exemptions from taxation are strictly construed. A corporation claiming to own a secret non-patented process by which, without the use of any chemical, it is enabled to make selections of green coffees which, through careful and cleanly roasting and a secret process of cooling, produce "brands" of unground roasted coffees, each one of which is claimed to have a recognizable taste—is not a "manufacturer" within the meaning of Art. 206 of the Constitution, and is not exempt under that article from the payment of a license.

City vs. Coffee Company, 86.

A person engaged in the trade, business or calling of baking bread, in which he exclusively deals, is not a manufacturer in the sense of Art. 206 of the Constitution, and is not entitled to constitutional immunity from the payment of a license tax.

State vs. Eckendorf, 131.

CONSTITUTION—Continued.

A school-house in which stenography and typewriting are exclusively taught is not exempt from taxation by Art. 207 of the Constitution.

The proviso in said article excludes from its benefits schools that are conducted for private profit.

Lichtentag vs. Tax Collector, 572.

The ordinance of the city of New Orleans requiring (under penalties in case of refusal) vendors of milk to the public to furnish gratuitously on application of sanitary inspectors samples of milk not exceeding one-half pint for inspection and analysis is not unconstitutional as forcing dairymen to furnish evidence against themselves, as taking private property for public use without compensation and without due process of law, as depriving them and their property of the equal protection of the law, and denying them protection in person and property from unreasonable searches and seizures and authorizing invasion of the same, without warrant founded on oath or affirmation.

The ordinance is not unreasonable, vexatious and oppressive, but a legitimate exercise of the police power for the public health.

State vs. Dupaquier, 577.

Act No. 106 of 1892, entitled "An act to provide for contesting elections held under Arts. 209, 242 and 250 of the Constitution of 1879, and the laws to carry the same into effect," is not unconstitutional as violative of Arts. 29 and 30 of that instrument.

Lucky et al. vs. Police Jury et al., 679.

City ordinance 4155, C. S., which prohibits the sale of vegetables in designated parts of the market between the hours of 7 o'clock A. M. and 2 o'clock P. M. is constitutional.

State vs. Sarradat, 700.

The provisions of Art. 201 of the Constitution, that for any of the causes enumerated in Art. 196 district attorneys, clerks of court, sheriffs, coroners, recorders, justices of the peace, and all other parish, municipal and ward officers, shall be removed by judgment of the District Court of the domicile of such officer (in the parish of Orleans the Civil District Court) are not exclusive of all other methods by which municipal officers may be displaced.

CONSTITUTION—*Continued.*

The power granted by the General Assembly in Secs. 58 *et seq.* of the charter of New Orleans to the Common Council to remove the recorders of the Recorder's Court by impeachment proceedings is constitutionally granted.

State ex rel. Whitaker vs. Adams et al., 830.

Property leased for manufacturing purposes is not exempt from taxation under Art. 207 of the Constitution.

The word "employed" used in said article means invested.

The lessor not having invested said property in the manufacturing interest for which he leased it, the property so leased is not exempt from taxation.

State ex rel. Ward vs. Board of Assessors, 859.

An act providing for the appointment by the Governor of an inspector, with power under the supervision of the Board of Health to inspect throughout the State animals intended to be slaughtered for human food and providing for his fees, is not in conflict with Art. 48 of the Constitution, because the act professes to amend a legislative act embodying the charter of a corporation—the proposed amendment being immaterial and the act assailed being valid if the proposed amendment is stricken out.

State vs. Slaughterhouse and Refrigerating Co., 1031.

Nor will such act relating altogether to the inspection of animals intended for human food be deemed to include more than one subject in violation of Art. 29 of the Constitution, because it professes to amend a prior act on the subject of inspection, the act assailed being entirely sufficient to effect its object if the proposed amendment had not been inserted.

The title to charge the Board of Health with the supervision of the inspection of stock to be slaughtered for human food covers the appointment of an inspector of such stock and the provision for his fees.

Nor does such an act for the inspection of stock throughout the State require previous notice under Art. 48 of the Constitution.

The authority conferred by Art. 248 of the Constitution of the State on municipal corporations and parishes, to regulate within their limits the slaughtering of animals for human food, does not strip

CONSTITUTION—Continued.

the State of the police power to provide for the appointment of an inspector of all such animals slaughtered throughout the State, such inspection to be under the supervision of the Board of Health. Cooley on Constitutional Limitations, Chapter 16, "Police Power;" The Slaughterhouse Case, 16 Wallace, 36; The Beer Case, 97 U. S. 25.

Id.

The occupation of the barber is mechanical, exempted from a license tax by the Constitution, nor is the exemption denied because he employs other barbers in conducting his business. Constitution, Art. 206; 44 An. 1116.

State vs. Hirn, 1443.

See Exemptions; Laws.

CONTRACTS.

An agreement signed by an ostensible purchaser of flour couched in the following language:

"Bought of E. O. Stanard Milling Company 3000 barrels of Eagle Steam flour at \$3.85 f. o. b. St. Louis, for shipment at my option during month of March, 1893. It is further agreed and understood that if I do not want to receive the flour in March, settlement may be made as follows, viz.: E. O. Stanard Milling Company paying me any difference there may be if an advance in value on my paying E. O. Stanard Milling Company the difference between the purchase price and the market price at the time of settlement, provided the value then is less than the purchase price. Settling prices to be based on St. Louis Merchants Exchange quotations on extra fancy flour at date of settlement," held to be void as coming within the provisions of Art. 2983 of the Civil Code relative to gaming.

Milling Company vs. Flower, 315.

Generally, an executed contract, fairly made with one who was apparently of sound mind and not known to be otherwise, and of which he had received the benefit, can not be avoided by his legal representative more than fourteen years after the date of the contract.

Vanosdel vs. Hyce, 387.

CONTRACTS—*Continued.*

The law will not maintain a contract, the consent to which of one of the parties is the result of error as to the substance of the contract, the error being caused by artifices and fraudulent representations of the other party; or if the frauds, not his directly, have been participated in or made effective by him. Civil Code, Arts. 1847, 1848; 1 Story's Equity, Secs. 189, 191, 192, 193, 195. *Ashley vs. Schmalinski et al.*, 499.

Under our law damages and not specific performance, at least in ordinary cases, is the relief for breach of a contract for the payment of money, Civil Code, Arts. 1927-1934; Story's Equity, Sec. 714.

Rice vs. Rice, 712.

Courts will not adjust a controversy arising out of the illegal purpose and attempt of a Draymen's Association to deprive the presses of this city of the right to choose the labor required for hauling cotton, the association proposing to accomplish this by passing a tariff of charges for hauling, designating their members to do the hauling, and subscribing money to prevent the presses from obtaining any labor except that furnished by the association, to be paid according to their tariff, and the testimony showing that the purpose was made effective by the money put up by the association and other methods by which non-union men were compelled to abandon the service of the presses. Civil Code, Arts. 1893, 1895; *India Association vs. Knick*, 14 An. 118; *Gravier vs. Carraby*, 17 La. 142, and cases collected in 2d *Hennen's Digest*, 1007, No. 1.

Fabacher vs. Bryant & Mather, 820.

Where a party who sells his business and the good will thereof contracts that he will not engage in the same business in the same place for five years, and stipulates "that in the event of the violation of his engagement in whole or in part, the damages inflicted upon the purchaser, in consequence thereof, are liquidated and fixed at five thousand dollars, which he agrees to pay as a penalty for said violation, and consents that the purchaser shall restrain him by injunction, if necessary, from any attempt to violate said engagement, authorizing any court of competent

CONTRACTS—Continued.

jurisdiction to do so on application," his subsequent violation of the agreement will not entitle the other party to demand and obtain at one and the same time a judgment for five thousand dollars and an injunction.

Parties are much more free to make contracts than they are to stipulate for and regulate legal remedies.

Where a party sues for a personal judgment for five thousand dollars as the stipulated penalty, or the damages fixed and liquidated for a violation in whole or in part of a contract, not to do certain business for five years, and demands and obtains at the same time against the other party an injunction restraining him from pursuing such business as an instrumentality to enforce specific performance—the demand, as presented and filed with the two remedies coupled, is an entirety and an inequitable one. The injunction should not be allowed. If allowed it can not be made good *ab initio* by a subsequent offer to discontinue a part of the demand. A motion to dissolve the injunction was correctly sustained.

Solomon vs. Diefenthal, 897.

See Damages.

CORPORATIONS.

An exception that the petition of a corporation does not show that suit was authorized, will be overruled if the affidavit accompanying the petition discloses the name of the vice president of the company, and affirms the truth of its allegations, the necessary inference therefrom being that the suit was apparently authorized.

Lacaze & Reine vs. Creditors, 237.

In the absence of fraud or demonstrable error a party recognizing the existence of a corporation by subscribing for its stock can not defend an action on his subscription by impeaching the existence and capacity of the corporation.

The defendant having taken a loan as a stockholder can not sustain the plea of the want of capacity of plaintiff to sue for the recovery of the amount loaned.

Homestead Company vs. Linigan, 1119.

CORPORATIONS—*Continued.*

A stockholder having sued the corporation for the annulment and revocation of a sale of property to a director and stockholder, charging fraud and want of consideration; and the corporation having sought to justify its action by a ratification of the stockholders at a general meeting, the plaintiff will be estopped from proving that the shares of stock which were voted at the meeting were fraudulently issued without consideration, the evidence being stamped on the face of the certificates that same were certified by him as the secretary of the corporation and issued to the stockholders.

This case is not that of a witness whose testimony is objected to on the ground that he can not be heard to impeach the truthfulness of a certificate he had previously made as an officer, but that of a party who sues the corporation of which he is a shareholder for the annulment of a sale which the corporation has made, and charges, as a badge of nullity, that the shares of stock which were voted at a general meeting, approving and ratifying the sale, were fraudulently issued, when in fact the certificates signed by the plaintiff as secretary of the corporation show on their face that they were fully paid up at the date of their issuance.

Wisner vs. Delhi Land and Improvement Company, 1223.

Purchasers, under foreclosures of mortgages of railroad franchises and property, may organize a corporation under such name as they may adopt, which, by the organization, succeeds to such franchises and property and takes the corporate capacity of the corporation against which the foreclosure proceedings were conducted. Act 38, 1877; 148 U. S. 897.

Railroad Co. vs. Elmore et al., 1237.

The grant of lands by the United States in aid of a railroad, the State named as trustee for the road, the lands to revert to the United States if the road is not completed in ten years, the lands being identified by the grant and the listing approved, as directed by the act of Congress, vests title in the railroad company, although the road is not built within the limited time specified in the act, the grantor not insisting on the reversion, but accepting the subsequent completion of the road as compliance with

CORPORATIONS—Continued.

the grant. Act of Congress 3d June, 1856; 11th Statute at Large, 18; 21 Wall. 44; 41 An. 896; 42 An. 1019.

The State, a mere trustee, can not declare a forfeiture of the lands granted. Act 39 of 1879; 44 An. 984.

Those who settle on such lands in the face of the grant can not hold against the railroad company, and are possessors in bad faith, though the settlements are in contemplation of homestead entries and are made after the ten-year limit in the grant and the non-completion of the road within that period; for all gave notice that the grant by its terms takes effect from its date, and that conditions subsequent, *i. e.*, the non-completion of the road, may be waived and can be insisted on only by the United States by declaring the lands open for entry or equivalent act revoking the grant. Civil Code, Arts. 503, 3450, 3453; 42 An. 1019; 41 An. 896. *Id.*

COURTS—JURISDICTION.

When a legal proceeding is commenced against a person, whether resident within the jurisdiction of the court in which it is begun or not, the defendant must be brought in court, in some one of the forms provided by law, or a voluntary appearance must be made on his behalf, that jurisdiction may attach.

Sheriff, etc., vs. Judge, 29.

The plaintiff in injunction, having alleged that there was no process whatever, and having complied with prerequisites by taking the oath required and furnishing bond to obtain an injunction, the court of the domicile has jurisdiction to hear the cause on the merits. *Id.*

The courts have power to appoint receivers of corporations whenever necessary to preserve the interest of all concerned, and those who have ratified the appointment can not recall their consent, and in *ex parte* proceeding prosecute a suspensive appeal from the order appointing the receiver.

State ex rel. Brewing Company vs. Judge, 110.

The political corporation known as a parish may be sued within its territorial limits in any court of competent jurisdiction.

State ex rel. Police Jury vs. Justice of the Peace, 119.

COURTS—JURISDICTION—Continued.

A misunderstanding between appellants' counsel and the clerk can not have the effect of annulling an order rendered in open court, at the request of counsel for both parties and in their presence.

Archer et als. vs. Gonsoulin, 144.

The contention is not well founded that a judge of the Civil District Court who grants, prior to allotment, an order of injunction, in so doing exhausts his power over the order and is without authority, subsequently and prior to allotment, to modify or rescind the same. Until allotment he, for legal purposes, retains control of his own order.

State ex rel. Lehman vs. Judge, 163.

The power of courts to order the remission of funds belonging to a foreign succession to the representatives of the succession authorized to receive them by the courts of the domicile of the deceased, we consider undoubted. Its exercise is necessarily a matter of discretion, depending on the circumstances of each case, and is a consequence of that comity which prevails between nations in amity with each other.

The interests of commerce and civilization require that this comity should be carried into effect by our tribunals.

It is done in England and in other States of the Union in analogous and similar cases; and whenever the rights of our citizens are not affected by the act to be done, it is the duty of this court to act on a principle which is impressed on us equally by an enlightened policy and a certainty that it will tend to the great purposes of justice.

The court having recognized the validity of the judgment probating the will of Myra Clark Gaines, pronounced in New York, in which was the domicile of the testator;

The legatees and creditors being before the court and applying to be paid here;

The assets of the succession are ordered to be distributed here, and legacies, creditors and all charges are ordered paid from the funds on hand.

Succession of Gaines, 252.

COURTS—JURISDICTION—*Continued.*

Where it appears by the allegations of a petition, taken as true for the exception, that the defendant company carried the plaintiff, a passenger, beyond his point of destination; that he was forcibly put off at a point at which there was no station;

The wrongful act was, if truly alleged, a trespass, actionable in the parish in which the passenger was thus ejected.

Dave vs. Railroad and Steamship Company, 273.

The Circuit Courts of Appeals are vested with authority to issue writs of *mandamus*, prohibition and *certiorari* in aid of their appellate jurisdiction.

If the relator has a right to relief he must apply to the court in which the appeal is lodged, the only court having jurisdiction of the questions propounded in his application.

Troegel vs. Judge, 421.

In an association like the Iron Hall where all the members, although residing in different jurisdictions, are bound by a common contract to the Supreme Representative of the order, which manages a trust fund for the benefit of the entire membership, if a court at the domicile of the association appoint to it a receiver, on account of its insolvency, it is competent for a court in another jurisdiction to order trust funds, forming a part of the trust funds held by a local branch, to be paid into the hands of the receiver.

It is no objection to such an order that the central authority has made a regulation that only a certain portion of the trust fund shall be forwarded to it at stated times. The insolvency of the association makes the whole fund demandable for the purposes of distribution among those who have acquired rights on it.

Durward et al. vs. Jewett et als., 559.

Notwithstanding property in dispute in a petitory action be situated in the parish of Plaquemines, the Civil District Court of the parish of Orleans acquires full and complete jurisdiction *ratione materiæ et personæ* if the parties claiming ownership be *personally* cited therein—same being citizens of another State.

State vs. Buck and Fruit Company, 656.

COURTS—JURISDICTION—*Continued.*

Where the court, from all the circumstances in a particular case and from all the evidence in the record, can reach a conclusion as to what the actual legal vote cast at a particular precinct was, it is its duty to give effect to the vote, notwithstanding the election officers may have been guilty of misconduct in some particular respects. The rejection of the entire returns and the entire vote at a poll for misconduct by the election officials is not by way of penalty or punishment upon the commissioners, or the particular persons or interests to be benefited by the illegal action, but only because in the special case the truth is not deducible from the returns and the evidence. The political rights of the legal voters must be saved if it be possible to do so.

Lucky et al. vs. Police Jury et al., 879.

Courts will not adjust a controversy arising out of the illegal purpose and attempt of a Draymen's Association to deprive the presses of this city of the right to choose the labor required for hauling cotton, the association proposing to accomplish this by passing a tariff of charges for hauling, designating their members to do the hauling, and subscribing money to prevent the presses from obtaining any labor except that furnished by the association, to be paid according to their tariff, and the testimony showing that the purpose was made effective by the money put up by the association and other methods by which non-union men were compelled to abandon the service of the presses. Civil Code, Arts. 1893, 1895; *India Association vs. Knick*, 14 An. 118; *Gravier vs. Carraby*, 17 La. 142, and cases collected in 2d *Hennen's Digest*, 1007, No. 1.

The court in aid of public policy and the law will notice irrespective of the pleadings that the controversy submitted for adjudication grows out of illegal purposes or combinations, and that illegality manifested by the record, it is obligatory on the court to dismiss the suit. *Ibid.*

Fabacher vs. Bryant & Mather, 820.

The value of the land involved, the revenues and the improvements to be partitioned in case of judgment for plaintiff, enter into consideration in determining jurisdiction.

Ross vs. Enaut et al., 1251.

COURTS—JURISDICTION—*Continued.*

The court where the property is situated has jurisdiction of a suit to have property sold to effect a partition of property of which minors, who are absentees, are co-proprietors with major heirs, who are present, and the surviving wife. 31 An. 572.

Crawford vs. Binion, 1261.

There may be illegal opposition and resistance to the execution of the process or order of court, without the application of actual physical force or the use of words. Any conduct which would place the officer executing the order in bodily fear or terror, would constitute the illegal opposition and resistance contemplated by the law. Threats may be communicated by signs, by tones of voice, or by actions as fully as by word of mouth.

Armstrong et als. vs. Railroad Company, 1448.

CRIMINAL LAW.

The finding by the jury of the guilt of an accused must be direct and positive.

The court is not justified to "reason" out an inferred verdict of guilty. A verdict consisting of the simple word "manslaughter" written on the indictment, not prefixed by the words "guilty of," is fatally defective, and it is not cured by a polling of the jury when "Is 'manslaughter' your verdict?" was the only question asked of its members.

State vs. Simon Johnson, 5.

When the proceedings are on a bond for the appearance of an accused, the call on the principal and the surety, by the sheriff under the order of court, must be made in order that the judgment pronounced may be valid. This formality is jurisdictional.

Sheriff, etc., vs. Judge, 29.

The judge correctly refused to permit the District Attorney to move for the forfeiture of the bail bond of the accused on the second day of the criminal term, and based his ruling upon proof that the accused was prevented from attending court by physical disability.

State vs. Stewart, 117.

CRIMINAL LAW—Continued.

The defendant has no right to a postponement of his case to await the result of the trial of another case.

Reason and authority sustain the right of the court to discharge a jury in cases of physical or moral necessity.

After a juror has been accepted, if it be discovered that he is incompetent to serve he may, in the exercise of a sound discretion, be set aside by the court at any time before the evidence goes to the jury.

Jeopardy can not begin before the case is opened before the jury and the indictment is read.

State vs. Nash & Barnett, 194.

In this State the right of the accused in a criminal case to introduce testimony as to threats on the part of the deceased, and as to his character as a violent, quarrelsome man, is not absolute. Such testimony is only exceptionally admissible, and the condition precedent upon which it is admissible is that the District Judge should have found that under the evidence in the case as a whole the question of the commission by the deceased of an overt act had been proved and had become legally a relevant fact. In dealing with that question this court has repeatedly recognized the right of the District Court to pass upon the credibility of the witnesses.

If the bill of exceptions taken to the refusal of a District Judge to admit such evidence shows that even if certain testimony which he had declined to have reduced to writing at the request of the accused had been embodied in full in the bill it would be insufficient to break the force of the recitals of the judge as to other testimony in the case on which he rested his conclusions for excluding the evidence, the refusal to have such particular testimony reduced to writing would not be reversible error, the correctness of the judge's statements as to this other testimony not being controverted.

Id., 194.

If the defendant is made aware, previous to trial, of the necessity of employing counsel to defend his case, and neglects to make such employment and declines to accept the services of counsel whose services are placed at his command, it is his own fault if he proceeds to trial without requiring service of a copy of the jury list

CRIMINAL LAW—*Continued.*

and the information as the law requires; and if illegal or incompetent evidence is admitted against him without objection, he is to blame.

State vs. Bingham, 299.

When in a case of forgery the instrument forged does not, on its face, appear to be valuable or adapted to work a fraud, extrinsic matter must be averred to enable the court to see its fraudulent tendency in matter of law.

State vs. Murphy, 416.

The proof of shooting in a house, at a person, who is also in the house, is not the proof required to show that a person shot at a dwelling house, there being persons therein.

State vs. Kye, 424.

The accused appealed from the verdict and sentence refusing him a new trial on the ground of newly discovered evidence.

Applications for new trials on this ground must be received with caution; there was an absolute want of ordinary diligence on the part of accused.

The court that sat on the trial, that heard the witnesses, had opportunity to form an opinion of the facts and attending circumstances, and having determined that the newly discovered evidence was cumulative, will not be overruled by this court.

The accused having applied for an order to examine witnesses on a day fixed, his failure to call witnesses that were within the process of the court add to reasons justifying refusal of a new trial. Examination of witnesses to prove newly discovered evidence was within the discretion of the trial judge. Citing *State vs. Washington*, 36 An. 341; *State vs. Belard*, 34 An. 105.

State vs. Gabe Jones, 545.

Whatever the answer of the juror on his *voir dire* to the questions of counsel for the accused, if it appear on the whole examination, and especially to the questions of the judge, that the juror has no fixed opinion—i. e., that can not be changed by testimony, and his mind is in a condition to do justice, according to the evidence and the charge of the court, he is a competent juror. 35 An. 302, 317; 38 An. 41, 480.

CRIMINAL LAW—*Continued.*

If the accused obtains an acceptable jury without exhausting his peremptory challenges, the Supreme Court will not direct a new trial, because the bill assigned error in the overruling of the challenges for cause made by the accused. *Ibid.*

State vs. LeDuff, 546.

In the absence of some charge of fraud or wrong committed in the drawing or the summoning of the general *venire* of jurors, which would work great and irreparable injury, a motion to quash and set aside the *venire* can not prevail. Citing Act 44 of 1877, Sec. 10.

State ex rel. Saintes, 547.

In an indictment for rape the averment that the act was committed against the will and consent of the female is equivalent to the averment "without her consent." Hence, under such indictment, testimony is admissible that she was under the consenting age, the testimony supporting the averment "without her consent." Wh. C. L., Secs. 556, 558, 559; 1 Bishop, 1121, 1122; 2 Bishop, 61.

State vs. Jackson, 547.

The defendant was convicted of larceny. He alleges as errors: That the general *venire* for the term had been illegally drawn. This ground is not tenable, for, though under indictment, he did not move to annul and set aside the *venire* on the first day of the term.

That one of the jurors was a non-resident. This ground is not sustained by the facts certified to this court; moreover, application for a new trial for this cause should show not only that defendant was not, but that counsel also was not aware of any fact affecting competency of the juror, if he was incompetent.

That one of the defendant's witnesses, charged with perjury, was arrested in the presence of the jury that tried him. It is not shown that the arrest was made in the presence of the jury. *State vs. Ford*, 37 An. 456.

State vs. Labauve, 548.

Appeals from sentences and judgments in the Criminal District Court of the parish of Orleans must be taken in conformity with the statute regulating appeals in criminal cases.

CRIMINAL LAW—Continued.

Judgments forfeiting bonds by said court are controlled by the same statute. *State vs. Burns*, 38 An. 363.

The judgment of forfeiture was rendered January 17, 1893; the appeal was taken January 15, 1894. The appeal is dismissed.

State vs. Alexander, 551.

Whenever a plea of *autrefois acquit* is demurrable it is triable by the judge and not referable to the jury.

The allowance of a severance of trial is matter within the discretion of the judge, except evidence discloses that different defendants have antagonistic defences.

An indictment may be fatally defective *quoad* a charge of murder and perfectly good *quoad* a charge of manslaughter.

State vs. Lee et als., 623.

The rule is well established in criminal cases, in matters of applications for new trials, that the affidavit alone of the applicant is not sufficient. It must be supported by the affidavits of others, and, when possible, by those of the newly-discovered witnesses.

State vs. Oliver, 654.

If is error for the trial judge, in a trial for murder, to refuse to charge the jury that they can, if the evidence justifies it, return a verdict of guilty of manslaughter.

He should do so in all cases where parties are indicted for murder. 40 An. 725; 41 An. 411.

State vs. Clark, 704.

State vs. Jones, 1395.

The mere fact of going to the place where the accused lived and seeking an explanation from him does not in itself constitute such an act of hostility as would justify the taking of human life. In order to constitute the overt act or hostile demonstration that would justify the taking of human life there must be some demonstration made by deceased against accused as to impress upon the latter that he was in imminent danger of his life, or some great bodily harm.

State vs. Williams, 709.

CRIMINAL LAW—Continued.

In some instances the extent of the overt act which would induce the accused to act in his self-defence is measured by the character of the deceased for a violent, quarrelsome, dangerous and turbulent disposition, notorious in the community or known to the accused.

Id.

Whether neither the crime charged nor its punishment is dependent upon values—values need not be declared in the indictment.

Mere matters of evidence not necessary for the validity of an indictment are not to be alleged in it in order to introduce under the indictment evidence pertinent and relevant to the charge.

If before the trial commences it is discovered that one of the jury is incompetent, by reason of relationship to the accused, he may be legally set aside and the panel completed in the ordinary course.

State vs. Hill, 736.

On the completion and empaneling of a jury, the jeopardy begins; but it begins only when the panel is full; until full, the jeopardy is not perfect.

Without a complete jury the defendant can not be conducted to the period of his jeopardy; but after the jury, being full and complete, is sworn, and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the defendant has reached the period of jeopardy from the repetition of which the constitutional provision protects him.

State vs. Robinson, 769.

Two of the jurors drawn for the term deposed on their *voir dire* that they would not convict on circumstantial evidence.

They were properly ordered to stand aside.

The trial judge committed no error in excluding jurors from the panel who are unwilling to convict on legal evidence.

The trial judge ruled that the evidence did not prove that the deceased made a hostile demonstration against the accused.

The required foundation not having been laid, proof of communicated threats by the deceased against the accused was not admissible to rebut malice and reduce the grade of the offence.

State vs. Barker, 798.

CRIMINAL LAW—Continued.

Section 1010 of the Revised Statutes makes it the duty of a justice of the peace to order arrests for alleged crime upon the oath of one or more "credible" witnesses. It is not the statement or even the affidavit of every person upon which he is called to act or which furnishes the "knowledge conveyed to a public officer" which opens the running of prescription against a prosecution for crime.

The law contemplates that an officer shall bring a sound legal discretion to bear in ascertaining whether a charge, if made, should be seriously considered, and where, under the special facts of a particular case, an officer was warranted in not taking action upon what is afterward set up in a plea of prescription as his knowledge of the commission of a crime by a particular person the plea is properly overruled.

State vs. Touchet, 827.

It is a rule subject to special exceptions that when a person is on trial for one offence evidence of another and extraneous crime is inadmissible. Such evidence is dangerous and calculated to lead to conviction upon a particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offences in order to produce conviction for a single one.

To make one criminal act evidence of another, a connection between the two must have existed linking them together. If the court does not clearly perceive the connection between the two offences (as to the commission of both of which evidence is tendered) it should give in the special case the benefit of the doubt to the prisoner.

State vs. Bates & Ramp, 849.

The right of the trial judge to discharge a juror in case of evident moral and physical necessity before the panel is completed, or before evidence is introduced on the trial, is now a part of the fixed jurisprudence of this State.

Possession of property and an apparent ownership are sufficient to support the charges in an indictment for robbery and larceny. It is therefore immaterial whether the party from whom the goods were taken had placed them on the assessment roll.

CRIMINAL LAW—Continued.

The fact that the prosecutor had made oath to the assessment roll and left off the same, the money alleged to have been stolen, is not admissible in evidence to impeach his testimony for truth and veracity.

It is inadmissible, in order to attack veracity, to prove the bad character of a female witness for chastity, or to show that she is a prostitute.

Testimony that the accused broke jail is admissible testimony.

A side remark made by the assistant prosecutor *sotto voce* to the associate counsel that he will make no further objections to what the witness says is not a comment on the testimony of the witness, and is not of that character to affect the rights of the defendant. When no ruling of the court is asked, it is not apparent to which a bill in such a case applies.

Matters in the course of the trial which should be at once excepted to and bill reserved can not be urged in motions for a new trial.

State vs. Hobgood et al., 855.

A juror having been examined on his *voir dire*, was accepted by the State and by the defendant.

The juror, not yet sworn, informed the court of his disqualification, in regard to which he had not been questioned.

He was re-examined only as to the disqualification disclosed. It was proved and the juror was ordered to stand aside.

It does not appear that the trial court exceeded the bounds of the discretion with which it is invested, in having ordered this juror to stand aside; moreover, it is not shown that the defendant exhausted her peremptory challenges. There was, the afore, no prejudicial error committed subject to review.

A juror having testified on his *voir dire* that he had reached a conclusion as to the guilt or innocence of the accused, unalterable by any testimony, was excluded from the jury.

He had been examined by the District Attorney.

Counsel for defendant asked to question the juror, which was refused.

It is not shown that the juror had not been sufficiently examined to establish his prejudgment, nor that in consequence defendant's peremptory challenges were exhausted.

CRIMINAL LAW—Continued.

To establish the bawdy character of the house and its bad reputation, the evidence of the persons frequenting it was admissible. The bawdy character of the house may be shown by its general reputation (and the bad reputation of the persons frequenting the house), with other evidence leading to that conclusion. The trial judge, in his statement in the bill, says, "that he had instructed the jury on the subjects in regard to which special instruction was asked by the defendant." There is no record of the instruction given. The charge is presumed to have been correct, in the absence of any exception or of a request to instruct the jury in writing. Moreover, common reputation as to the character of the defendant, and of the house which she kept, was admissible. It was left to the jury to determine as to the weight of this and other evidence.

State vs. West et al., 1009-10.

If the motion to quash an indictment for alleged defects in drawing the jury may, in certain cases, be made after the first day of the term, such motion will be deemed too late made several days after the indictment is found and ten days after the beginning of the term, especially when the accused is in custody awaiting indictment when the term begins, and all the facts on which the motion is based are then known to his counsel. Act No. 44 of 1877, Secs. 10, 11; 5 An. 342; 31 An. 94, 369; 37 An. 216.

State vs. Leftwich, 1194.

The statement of the judge in the bill of exceptions, that he ordered of his own motion the plea of not guilty to be entered for the accused, will be deemed conclusive in this court, and the verdict will not be set aside and a new trial ordered because the judge ordered the minutes corrected so as to show the entering of the plea and refused to hear testimony contradicting his statement of the performance of an official act and the corrected minutes. 32 An. 1227; 34 An. 881; 39 An. 1105.

Id.

Nor will the verdict be set aside and a new trial ordered because the lower court overruled questions to the jurors on their *voir dire* whether or not they would follow the instructions of the court

CRIMINAL LAW—Continued.

in the contingency of circumstantial testimony, the question supposed might be presented, it appearing by the bill the court gave the jury an accurate charge as to nature and degree of circumstantial testimony required to convict.

Id.

After trial and verdict in a criminal case—i. e., a murder, there must be conditions highly exceptional to authorize the appointment of experts to examine and report whether stains on the dress of the deceased produced before or referred to in the testimony given to the jury were blood stains, the report to be used on the new trial sought to be obtained. No such conditions exist in this case, nor will the new trial be granted on the ground of newly discovered testimony which, if attainable, with due diligence could have been obtained on the trial.

Id.

The verdict embraced the two counts of the information, and although the first count was vicious the verdict is not disturbed as to the count that is good.

The effect is the same as if the vicious count had been quashed as defective. The accused was sentenced under the good count.

The defendant was charged in the second and good count with shooting with intent to murder, under circumstances other than those mentioned in Sec. 790 of the Revised Statutes.

The "robbery" charged in the first count was surplusage in so far as related to the second and good count.

The accused was not prosecuted under Sec. 790 of the Revised Statutes.

The information was framed under Sec. 791 of the Revised Statutes, and complies with the requirements of that section.

State vs. Louis, 1247.

The error assigned in the indictment under Sec. 790 of the Revised Statutes for stabbing with intent to murder while lying in wait, or in the perpetration or attempt to perpetrate a robbery, etc., that the essentials of the robbery are not set out, will not be sustained when rejecting as surplusage all words relating to robbery, and the perpetration or attempt to perpetrate that crime,

CRIMINAL LAW—Continued.

there is the complete offence charged of lying in wait and stabbing with intent to commit murder. R. S., Sec. 790; 21 An. 748; State vs. Humphries, 35 An. 966.

State vs. Tyler, 1269.

The summoning of the witnesses who testified on the preliminary examination of the accused and the returns of the sheriff *not found*, unless it is made to appear the witnesses are in fact within reach of the process of the court, is sufficient to authorize the introduction of their testimony on the examination. R. S. 1010.

Id.

The *venire* of jurors will not be set aside and the indictment quashed merely because one of the commissioners wrote the names of the jurors on a portion of the ballots in the jury box, or because there is a number on the ballots manifestly intended to designate the ward of the residence of the juror, it appearing the names were so written by one of the commissioners in the presence of his co-commissioners and clerk; and although the clerk is required by the act to write the names, and although the act requires the ballot should express the residence as well as the names of the jurors; the irregularities indicated being within the provisions of the act maintaining the *venire* and indictment, unless it is shown the irregularities caused great wrong to the accused. Act No. 44 of 1877

State vs. White, 1273.

No foundation for the introduction of the testimony on the preliminary examination of the accused is required, other than that afforded by the certificate of the committing magistrate, save when it is claimed the witnesses are within reach of process and should be produced, then diligence to obtain their presence is an issue. R. S. Sec. 1010.

Id., 1274.

It is presumable that ballots in the jury box bear names of jurors written by clerks of the District Court who have passed out of office, and the testimony of the incumbent clerk, on the motion to quash the *venire*, that he did not recognize the handwriting on three of the ballots drawn from the box, does not authorize

CRIMINAL LAW—*Continued.*

the conclusion that others than the clerk wrote the names on the ballots so drawn, but the inference is the names were written by the predecessors, or some of them, of the incumbent clerk, and of whose handwriting he had no knowledge. Acts 1877, No. 44.

Id., 1274.

The defendant was indicted for forgery.

He signed the names of a number of drawers to a note, and signed an *addendum* to the note that he was their authorized agent.

In a prosecution for forgery the defendant can not be convicted of having falsely assumed to act as agent.

The instrument appears on its face to have been executed by an authorized agent, the defendant; an apparent agent is not guilty of forgery though he had no authority in fact.

State vs. Taylor, 1332.

Proof of former consistent statements is inadmissible to sustain a witness who has been impeached by proof of former inconsistent statements, except his testimony is charged to have been given under the influence of some improper or interested motive, or to be a recent fabrication, *i. e.*, where the counsel on the other side impute to the witness a design to misrepresent from some motive of interest or relationship, in which case, in order to repel such imputation, it is proper to show that the witness made a similar statement at a time when the supposed motive did not exist, and the effect of such statement could not be foreseen. *Rapalje Crim. Procedure.*

The question involved did not fall within the exception, and there was no ground upon which to admit the testimony.

The harmless utterances of a thoughtless deputy sheriff, in charge of a jury, are not sufficient cause to annul the verdict.

State vs. Cady, 1346.

The discovery, through a confession, of facts legally admissible in evidence tending to show a defendant guilty of the charge against him, would not render admissible the confession itself if it was not voluntary and free from compulsion or inducement.

State vs. Jones, 1395.

CRIMINAL LAW—*Continued.*

The principle attempted to be announced by a party indicted for murder in a requested special charge to the jury that "even if the killing be proved, and that the prisoner at the bar did it, that does not permit the law or the jury to presume malice" is stated entirely too broadly and, as stated, was correctly refused.

After a general charge to the jury, in which the court had fully instructed it as to what constituted the crime of murder, including a full definition of express and implied malice, and the manner of proving it, and that it was incumbent on the State to prove all the necessary elements going to constitute the crime of murder, as defined beyond a reasonable doubt, a special charge was given to the effect that "from the mere proof of the killing by the accused, malice is not to be presumed as a matter of law or by the jury, but where the facts and circumstances of the killing are placed in evidence before the jury, and there was no accompanying palliating or extenuating circumstances, the jury may infer malice." *Held*: That through the general and special charge the jury was fully and properly advised as to the law, and as to its duty in the case.

State vs. Wright, 1403.

The word *feloniously* following the word *wilfully* in an indictment under Sec. 792, Revised Statutes, is surplusage and meaningless. The judge, therefore, is not required to charge the jury as to its meaning.

Where evidence as to the overt act is contradictory, and the preponderance of evidence is against it, the trial judge is necessarily clothed with authority to decide whether it has been proved in order to lay the foundation for the introduction of evidence as to character.

State vs. Beck, 1419.

State vs. Green, 1522.

The charge of the judge correctly defined forgery, and instructed the jury that to find the accused guilty they ought to infer an intent to defraud the person whose signature was forged.

The receipt alleged to have been forged was in due form, and, if genuine, would have been proof in court of payment.

It was the subject of forgery.

State vs. Gus. Smith, 1433.

CRIMINAL LAW—Continued.

The signature of the accused to the bond to obtain his release is not a waiver of notice of the motion filed for a change of venue, nor can it have the effect of a consent to the granting of the motion without evidence and contradictory hearing.

It is not a case of insufficiency of notice of the motion for a new trial and insufficiency of evidence on the trial of the motion, but of absolute want of either, and of the absence of contradictory hearing and all note of evidence.

State vs. Dubuclet, 1437.

The verdict of a jury in a criminal case will not be set aside and a new trial ordered because the defendant waived the jury and claimed a trial by the court, which was denied by the trial judge; it appearing by the bills of exception the judge approved the verdict. In such case to direct a new trial would be idle.

Nor will such verdict be set aside because the indictment charging assault with intent to murder, notwithstanding the objection of the accused reserved by his bill of exceptions the question is allowed to be put and answered, that the party assaulted was the town marshal, charged with preserving the peace, the testimony having no tendency to prejudice the accused, and besides admissible to show that the party assaulted was in the peace of the State. 24 An. 29.

The charge to the jury that a peace officer may, without warrant, arrest for breaches of the peace committed in his presence, is correct. 1 Archibald's Criminal Practice and Pleadings, Chap. 2, Sec. 1.

The court reaffirms it has no power to review the rulings of the lower court on applications for new trial in criminal cases, except as to questions of law arising on bills of exception exhibiting the facts on which the legal question is to be determined. 32 An. 854.

State vs. Guy, 1441.

That an indictment for the crime of embezzlement of a clerk or depository, under Sec. 905 of the Revised Statutes, is not defective or insufficient because not stating that a demand had been made for the return of the money or property embezzled.

CRIMINAL LAW—Continued.

The question of such demand having been made is one that appertains rather to the *quantum* of evidence sufficient to convict, and not to the sufficiency of the allegations of the indictment.

State vs. Flournoy, 1518.

If a party kills another from fear of death or great bodily harm he must be free from fault in bringing on the difficulty in order to justify the homicide. In cases of mutual combat both parties are the aggressors, and if one is killed it will be manslaughter at least, unless the survivor can prove that before the mortal stroke was given he had refused any further combat and retreated as far as he could with safety, and that he killed his adversary from necessity to avoid his own destruction or greater bodily harm to him.

Where the trial judge states in his charge to the jury principles of law applicable to the facts in the case, he is not required to give an additional charge which more specifically directs the attention of the jury to the application of the law to particular facts.

State vs. Spears, 1524.

DAMAGES.

When the clear right of a person is invaded, he must be entitled to an action against the party who inflicted the injury.

Assaulting a person and denouncing him in the presence of bystanders in a court building, in the presence of officers of the court as a thief, and as having robbed the party denouncing him, and his threats to cowhide the person, are indignities and insults actionable in themselves, without reference to character or reputation.

Even if a person has a bad character he has a right to be let alone, and to immunity from personal attacks.

Even if he has no reputation, he should not be denounced as a thief if he is not a thief.

Caspar vs. Prosadame, 36.

A servant, an "all-around workman," subject to the orders and directions of the master, whenever he is called upon to work in pursuance of conditions created by the master, has the right to assume superior knowledge, judgment and skill in the master, under whose orders he is immediately acting, and to believe that

DAMAGES—Continued.

he will be protected from danger; the master created the danger which the deceased was instructed and ordered to confront. He is therefore liable in damages for the negligence in putting in operation a cause which led to the death.

Helm, Tutrix, vs. O'Rourke, 185, 186.

With all due allowance for mitigating circumstances, damages will be awarded for injury to character by slander, aggravated by repetition. Civil Code, Arts. 1928 (par. 3), 2315; *Miller vs. Holstein*, 16 La. 389; *Savoie vs. Scanlan*, 43 An. 967; *Feray vs. Foote*, 12 An. 894.

To charge an innocent man with burning another's property is actionable. The law implies malice, and without proof of special injury damages will be given the injured party. *Id.*

Taylor vs. Ellington, 371.

On the dissolution of a provisional seizure for informality the plaintiff owes actual damages caused by the wrongful issuance of the writ.

Hollingsworth vs. Atkins Bros., 515.

In a suit for damages against a railroad company for opening one and closing two culverts in the road-bed, extending through plaintiff's land, by which it is claimed by plaintiff, the rain and seepage water were made to stand in his field, and drainage prevented, causing the loss of crop; the court will inquire into the situation of the land and its means of drainage, and the company will not be held responsible, if from the testimony it appears that plaintiff's alleged losses were due to depressions in the land, and obstructed drainage, not at all connected with the closing or opening of the culverts.

Felt vs. Railroad Co., 549.

The possessor of lands or tenements is not at liberty to plant in them dangerous instruments, which may seriously injure trespassers, but he is under no duty to keep his premises in a safe condition for other persons than those whom he invites—and, consequently, he is not liable to trespassers for injuries they may receive from defects not amounting to traps in such premises.

If a person allows a dangerous place to exist on premises occupied

DAMAGES—Continued.

by him, he will be responsible for injury caused thereby to any other person entering the premises by invitation or procurement, express or implied. The question of importance, then, is whether the place was dangerous *per se*; and was its situation such as to operate an invitation to trespassers?

Fredericks vs. Railroad Company, 1180.

Where persons mutually engage in bandying opprobrious epithets an action of slander is not to be encouraged for words thus uttered. The interchange of opprobrious epithets and mutual vituperation and abuse will justify a judge in approving a verdict for the defendant, although the slanderous words were proved, and a verdict rendered in such a case will not be disturbed by the Supreme Court.

Goldberg vs. Dobberton, 1303.

The apothecary is not liable in damages to the physician merely and only because the filling of his prescriptions is, on one or two occasions, declined by the apothecary for reasons not at all impugning the physician's capacity.

But the apothecary does incur such liability if, without the slightest cause, he indulges in public expressions tending to create the impression of the physician's incompetency, as, for instance, declaring his diploma "is not worth a straw."

Tarleton vs. Lagarde, 1368.

The court again discards the distinction of the common law as to slanderous words actionable *per se* and words slanderous in their character, but requiring proof of damage. Civil Code, Arts. 2315, 2316; 16 La. 389; 12 La. 894; 3 An. 207; 14 La. 298.

Id. 1369.

See Negligence.

DIVORCE.

The conditions on which the wife can be awarded alimony are (1) that she shall have instituted suit for a judicial separation, or one *a mensa et thoro*; (2) that she shall have left or declared her intention to leave her husband's domicile; and (3) that the judge shall have assigned her a home wherein she shall reside during the pendency of the suit.

DIVORCE—Continued.

The husband can not be compelled to pay alimony unless the wife proves that she has constantly resided in the home assigned her by the judge.

Suberville vs. Adams, 119.

DONATIONS.

A donation *inter vivos* of real property, null for want of form prescribed by law, can not be confirmed by the donor years after the death of the donee, and after the slave donated had been emancipated. 6 R. 331.

Cawthon vs. Kimbell et al., 750.

Donations between the spouses are revocable by mutual consent, and when revoked the property returns to the estate of the donor freed from any claim of his heirs for their legitime, which might have attached to the property if the donation had not been revoked. Civil Code, Arts. 1493, 1559; *Scudder vs. Howe*, 44 An. 1103.

Abes and Wife vs. Davis, 818

No one is presumed to have intended to make a donation.

In case a person makes a deposit in bank for the account of another, pursuant to a previous agreement, that, on a certain condition, the latter is to employ it for a designated purpose, and the former afterward calls for the restitution of said sum, before the fulfilment of said condition, he is entitled to have such custodian of the fund thus deposited respond to his call.

In case the claim of the respondent to such demand be, that an absolute donation of said sum of money was intended, he carries the burden of proving such donation by a fair preponderance of proof.

Cooney vs. Ryter & Bank, 883.

Where the terms of the asserted donations *inter vivos* leave it doubtful whether the usufruct of the property was conveyed to the donee or reserved to the donor, the court may seek the interpretation in the acts of the parties—i. e., denoting their appreciation of the asserted donations. Civil Code, Art. 1956.

Fontenot vs. Manuel, 1373.

DONATIONS—Continued.

The court affirms our jurisprudence, that the reservation in the donation *inter vivos* of the usufruct of the property to the donor annuls the donation. Civil Code, Arts. 1468, 1538; 4 An. 36; 5 An. 533; 12 An. 720.

Id., 1374.

See Marriage.

ELECTIONS.

Act No. 106 of 1892, entitled "An act to provide for contesting elections held under Arts. 209, 242 and 250 of the Constitution of 1879, and the laws to carry the same into effect," is not unconstitutional as violative of Arts. 29 and 30 of that instrument.

The police jury of Bienville parish was properly made a party defendant in the contest of an election held under Act. No. 88 of 1892, by citation upon its president.

Where the court, from all the circumstances in a particular case and from all the evidence in the record, can reach a conclusion as to what the actual legal vote cast at a particular precinct was, it is its duty to give effect to the vote, notwithstanding the election officers may have been guilty of misconduct in some particular respects. The rejection of the entire returns and the entire vote at a poll for misconduct by the election officials is not by way of penalty or punishment upon the commissioners, or the particular persons or interests to be benefited by the illegal action, but only because in the special case the truth is not deducible from the returns and the evidence. The political rights of the legal voters must be saved if it be possible to do so.

Where parties contesting an election place one of the commissioners upon the stand, and through him prove a particular illegal act by the commissioners, which is susceptible of separation from their general conduct and susceptible of special correction, and the same commissioner affirmatively proves (if his testimony is to be taken as trustworthy) that the fact shown was the only one of which complaint could be made, and that otherwise the votes cast were legally cast, and the returns made otherwise correctly showed the vote as cast, the court should limit the remedy to throwing out the votes shown to have been illegally cast and returned. Whether or not the commissioner under such circumstances is to be believed will depend upon all the facts and cir-

ELECTIONS—Continued.

cumstances of the case and the whole evidence in the record. He is not necessarily to be disbelieved. Plaintiffs, in placing him upon the stand as their witness, show confidence themselves in his truthfulness. It is very questionable whether the official acts of election commissioners should be permitted to be impeached by the testimony of the commissioners themselves.

Lucky et al. vs. Police Jury, 681.

The promulgation of the returns of election of the votes of tax-payers to determine whether a tax is to be imposed in aid of railroad enterprises, is a ministerial duty, obedience to which will be compelled by mandamus. The officials charged with the duty, when called on to make promulgation of the result, can raise no question of fraudulent voting or other objection to the validity of the tax; nor have such officials any discretion or power to withhold or refuse that promulgation. Act No. 35 of 1886; High on Extraordinary Remedies; 6 An. 68; 11 An. 672; 14 An. 249, *passim*. See decision between these parties in 45 An. 1024.

State ex rel. Reynolds & Henry Construction Co. vs. Mayor and Council, 1276.

ESTOPPEL.

Estoppels are not favored; no principle of natural justice nor of law can be invoked by which the fact that a third opponent has, prior to the sale, inconsistently claimed the proceeds and also asked for the annulment of the sale, should operate an estoppel for the protection of a purchaser of the property who was cognizant that the sale and the proceedings under which it was had, were simulations.

Herber vs. Thompson, 191.

Those who have adopted the errors of the notary and sought to utilize the same for their benefit to get into position as heirs, should not be permitted, because unsuccessful in their ultimate object, to turn back upon the notary for damages.

Murray et al. vs. Succession of Spencer, 453.

The party who promises to lend money required by the applicant for the loan to redeem his property from a tax sale will not be

ESTOPPEL—Continued.

permitted, after that promise and the faith it inspires acted on by the applicant, to redeem from the tax sale and acquire that property for himself. Bigelow on Estoppel, Chap. 19.

McConnell vs. Ory, 564.

Although the defendant in a proceeding for confiscation had no power of alienating the reversion or remainder which was still in him after the confiscation and sale, still an alienation of it by him, by a deed of warranty, accompanied by a covenant of seizin, or delivery of possession on his part, estops him, and all persons claiming under him, from asserting title to the premises, or against the vendee or grantee, or his heirs or their assigns, from conveying it to any other person whomsoever.

Beard vs. Lufriu, 875.

Matters once determined by a court of competent jurisdiction, if the judgment has become final, can never be called in question by the parties or third persons. It matters not under what form the question be presented, whenever the same question recurs between the same parties the plea of *res adjudicata* estops.

McNeely vs. Hyde, 1083.

A stockholder having sued the corporation for the annulment and revocation of a sale of property to a director and stockholder, charging fraud and want of consideration; and the corporation having sought to justify its action by a ratification of the stockholders at a general meeting, the plaintiff will be estopped from proving that the shares of stock which were voted at the meeting were fraudulently issued without consideration, the evidence being stamped on the face of the certificates that same were certified by him as the secretary of the corporation and issued to the stockholders.

Wisner vs. Delhi Land and Improvement Co., 1223.

Where mortgaged property is seized in the hands of a third possessor, who consents to its seizure and sale, waives the thirty days' demand of payment on principal debtors, and the ten days' demand on him as third possessor thereof, and who also accepts service of notice of seizure, appoints an appraiser to estimate the value of the seized property, and is present at the sale offering no

ESTOPPEL—Continued.

objection but bidding thereon, he is estopped from attacking subsequently the validity of the sale for any defects or informalities in the proceedings arising anterior to the sale. 5 R. 523; 19 La. 311; 12 An. 838; 2 An. 593; 1 An. 11; 36 An. 774; 43 An. 323; 34 An. 886.

Derouen vs. Hebert, 1388.

EVIDENCE.

Under the general issue in a suit for damages for injury to feeling and humiliation caused by an assault by the defendant on the plaintiff, and by the use of opprobrious epithets by the former, evidence of irritation and provocation was admissible in mitigation of damages, but was not admissible to defeat the action.

Caspar vs. Prosname, 36.

In a suit for damages for the death of a person alleged to have been caused by the negligence of the employes of a railroad company, where the plaintiffs allege themselves to be the widow and children of the deceased (the widow suing for herself individually and for the minors as their mother and tutrix), defendant is not entitled under an unrestricted offer or tender of evidence to introduce generally and against all the plaintiffs an extrajudicial admission made by the mother since the institution of the suit, that she was not married to the deceased, when prior to this admission she had testified as a witness in the case that she was his widow. Had she sued alone and in her own behalf, such an admission, if legally proved, was admissible against her. Quoad admissions made by her as affecting herself, her status as a party was not merged into that of a witness.

Jackson, Tutrix, vs. Railroad Company, 227.

When a machine stipulated to be furnished is delivered to the party bound to receive and pay for it, who, after a fair opportunity for examination and trial of the machine, promises payment of the price with conditions afterward waived by him, in the suit brought to compel that payment, the burden of proof will be on the defendant to prove the defects in the machine alleged to exist.

Edwards & Kurz vs. Cold Storage Company, 361.

EVIDENCE—Continued.

To charge an innocent man with burning another's property is actionable. The law implies malice, and without proof of special injury damages will be given the injured party.

Taylor vs. Ellington, 371.

Declarations of former owners of property in derogation of their own title and good faith, made after they had ceased to be owners, are not admissible against the subsequent vendees of the same.

Heirs of Ford vs. Mills & Phillips, 332.

If the deed contains a resolatory condition, the defendant in the possessory action has no right to offer evidence as to the happening of the condition which destroyed the deed.

Planting and Manufacturing Company vs. Higgason, 425.

The unsworn declaration of a partner reduced to writing some time after the transfer (the partner testified in the case and said nothing of additional interest included in the transfer) will not be admitted in evidence, to add to or to explain the terms and conditions of the contract of lease transferred.

Hollingsworth vs. Atkins Bros., 515.

It is very questionable whether the official acts of election commissioners should be permitted to be impeached by the testimony of the commissioners themselves.

Lucky et al. vs. Police Jury et al., 679.

When a will is established to have been made by the testator himself, or by a notary at his instance and dictation, in the presence and hearing of the subscribing witnesses, unaided by others, and its provisions and expressions are sage and judicious, containing nothing sounding to folly, these facts establish a presumption, even in the case of a person habitually insane, that it was made during the existence of a lucid interval, and impose on those who attack the will the burden of proving insanity at the moment when it was made.

Succession of Bey, 773.

The offer of testimony to show in what manner the agent acquired the note is not a contradiction of the indorsement when it is re-

EVIDENCE—*Continued.*

stricted as to whether the agent purchased the note for his own account with his funds, or for his principal with the latter's funds.

Gumbel & Co. vs. Boyer and Sheriff, 762.

The uncertain memory of witnesses regarding sections and quarter sections of land sold many years ago, do not prove title when entirely at variance with the advertisement leading to the sale.

Levy vs. Landry, 1361.

The court must give effect to testimony even when contrary to the allegations in the petition when received without objection from the party who might have excluded it by his objections, and especially when offered and received in behalf of the party by whom that objection might have been successfully interposed if offered by his adversary.

Fontenot vs. Manuel, 1374.

A document signed by the Registrar of the State Land Office, certified to by him to be a correct copy of the record of a patent which issued from that office, is admissible in evidence to show the date of the sale of the land by the State.

LeBleu et al. vs. Timber Co. et als., 1465.

An exception to the rule requiring proof by the subscribing witnesses to an act *sous seing privé* is admitted where the instrument is not directly in issue, but comes incidentally in question in course of the trial, in which case the execution may be proved by any competent testimony without calling the subscribing witnesses.

Id.

Parol is admissible to show that the undivided half of one of the lots, part of a plantation, was omitted by error, in a sheriff's deed. The proof of the alleged error must be clear; and in this case is deemed to be furnished in the act of mortgage under which the order of sale was obtained, describing the plantation by name, enumerating the lot in dispute as part of it; the order of sale directing the sale of the mortgaged property and all other property of the deceased mortgagee, and the adjudication presumably following that order, this evidence being supplemented by the closing of the succession of the deceased and the conduct of the

EVIDENCE—Continued.

parties manifesting, in the view of the court, their appreciation the sheriff's sale carried the property in dispute, all leading to the conclusion the omission in the sheriff's deed of the lot in dispute was an inadvertence.

Gladdish vs. Godchaux, 1571.

See Estoppel; Laws.

EXEMPTION:

Moneys standing to the credit of a non-resident firm on the books of a New Orleans bank are not taxable.

The debt due by a bank as arising from a deposit to the credit of a foreign firm in money is not distinguishable from those due to it from any other cause.

Clason vs. City, 5.

Imported goods in the importer's possession are not part of the property in the State subject to taxation.

While they remain in the original package the importer owes no tax upon them.

An article imported continues to be a part of the foreign commerce of the country while in the hands of the importer for sale in the original package.

The authority to import carries with it the right to sell the article in the original package.

When it has passed into the hands of a purchaser it is no longer an import and is subject to taxation like any other property.

State ex rel. Gelpi & Bro. vs. Board of Assessors, 145.

Exemptions from taxation are strictly construed. A corporation claiming to own a secret non-patented process by which, without the use of any chemical, it is enabled to make selections of green coffees which, through careful and cleanly roasting and a secret process of cooling, produce "brands" of unground roasted coffees, each one of which is claimed to have a recognizable taste—is not a "manufacturer" within the meaning of Art. 206 of the Constitution, and is not exempt under that article from the payment of a license.

City vs. Coffee Company, 86.

A school-house in which stenography and typewriting are exclusively taught is not exempt from taxation by Art. 207 of the Constitution.

EXEMPTION—Continued.

The proviso in said article excludes from its benefits schools that are conducted for private profit.

Lichtentag vs. Tax Collector, 572.

Property leased for manufacturing purposes is not exempt from taxation under Art. 207 of the Constitution.

The word "employed" used in said article means invested.

The lessor not having invested said property in the manufacturing interest for which he leased it, the property so leased is not exempt from taxation.

State ex rel. Ward vs. Board of Assessors, 859.

The occupation of the barber is mechanical, exempted from a license tax by the Constitution, nor is the exemption denied because he employs other barbers in conducting his business. Constitution, Art. 206; 44 An. 1116.

State vs. Hirn, 1443.

See Constitution.

FATHER AND CHILD.

The court will not interfere in the exercise of the authority and discretion vested in the father, after the death of his wife, as to whom the children should visit, although the obligation to visit grandparents is moral.

Succession of Reiss, 347.

HOMESTEAD COMPANIES.

The association provided that every member should pay weekly instalments on each of his shares; that as often as the funds of the association should warrant it, the same should be put up to competition among the members, and the member offering the highest premium should be entitled to them, and should secure the payment by satisfactory security and pledge of shares, and should pay from the time of purchase interest at the rate of six (6) per cent. per annum in weekly instalments on the loan and premium capitalized, as a redemption fee; that whenever any stock which had been pledged should become equal in value to the indebtedness for which the same was pledged, the stock should cancel the indebtedness, and it, the indebtedness, should be considered satisfied and be discharged.

HOMESTEAD COMPANIES—Continued.

The defendant purchased shares according to the articles of the association, received the amount of these shares, deducting the premium or discount, and gave security to secure both the loan and the discount.

Held: That the note and mortgage given as security are valid, and the sums secured are not usurious.

Homestead vs. Linigan, 1119.

HOMESTEAD.

When a husband has legally selected and recorded a homestead, the homestead right is not destroyed by the fact that, subsequently thereto, personal property of the husband, not included by him in the declaration, is transferred by him to his wife in payment of paraphernal funds of hers received by him and converted to his own use, this placing the property beyond the reach of his creditors. The Constitution contemplates the possibility of the coexistence of ownership of paraphernal property by the wife with a homestead right in the husband, when the value of the property of the wife is within the limits fixed by it.

If the wife has legal rights which she has enforced in a legal manner, her motives in exercising her rights do not concern the creditors of her husband. If she has no legal rights, or has enforced them in an illegal manner, the remedy of the creditors is to attack the judgment which recognizes them, and the transfer made under the judgment, to have it set aside, and the property included in the transfer subjected to the payment of their claims.

Spencer vs. Scott, Sheriff, 1209.

A mere paper assignment by third opponent of her homestead claim to her husband's seizing creditor, without any consideration, is a nullity, and can not found any rights in his favor, and can not exclude the assertion of her rights afterward.

The waiver or renunciation of a homestead claim, it being a provision of law in favor of the destitute, is against public policy.

Comeau vs. Miller, 1324.

HUSBAND AND WIFE.

The administration by the husband of the paraphernal property of the wife is not displaced and the community deprived of the fruits merely because the husband receives a salary from the

HUSBAND AND WIFE—Continued.

partnership of which his wife is a member, formed for the cultivation of the plantation, a part of which is her paraphernal property; the husband having the management of the entire plantation for the partnership as well as for his wife. Civil Code, Arts. 2383, 2385, 2386; 18 La. 431; 6 R. 41; 12 R. 524.

An action by the husband for alleged advances to and debts paid for such partnership, brought against the partner of his wife, is subject to the rule that one partner can not sue his copartner for specific sums, but only for a settlement of the partnership and for the balance with interest thereon found due on settlement.

Reddick vs. White, 1199.

When a husband has legally selected and recorded a homestead, the homestead right is not destroyed by the fact, that subsequently thereto, personal property of the husband, not included by him in the declaration, is transferred by him to his wife in payment of paraphernal funds of hers received by him and converted to his own use, thus placing this property beyond the reach of his creditors. The Constitution contemplates the possibility of the coexistence of ownership of paraphernal property by the wife with a homestead right in the husband, when the value of the property of the wife is within the limits fixed by it.

If the wife has legal rights which she has enforced in a legal manner, her motives in exercising her rights do not concern the creditors of her husband. If she has no legal rights, or has enforced them in an illegal manner, the remedy of the creditors is to attack the judgment which recognizes them, and the transfer made under the judgment, to have it set aside, and the property included in the transfer subjected to the payment of their claims.

Spencer vs. Scott, Sheriff, 1209.

When the wife sues her husband for a separation of property and a dissolution of the matrimonial community, she carries the burden of proving that the disorder of his affairs is such as to endanger her separate property, *in esse*, or her future acquisitions.

If she claim a moneyed judgment against the husband, or the recognition of her paraphernal title to property he has transferred to

HUSBAND AND WIFE—Continued.

her, in satisfaction, in whole or in part, of her claims against him, she must administer clear and satisfactory proof of her husband's indebtedness to sustain her action as against intervening creditors.

Bransford, Wife, vs. Husband, 1214.

In a *dation en paiement* the thing transferred to the wife must bear a just proportion in value to the amount due the wife. A sale is an entirety, and there is no contract where there is no agreement as to the price. If the property transferred to the wife exceeds appreciably the debt due her, she can not be permitted to retain a part of the property transferred and remain a creditor to the community for the difference.

Freiberg vs. Langfelder, 1418.

IMPEACHMENT.

See Removal.

INJUNCTION.

Where an injunction does not order the closing up of defendant's business, but restrains him simply from carrying it on in a manner resulting in an alleged continuing nuisance to the health and comfort of plaintiff and his family, it should not be set aside on bond, as the effect of the dissolution is to authorize and permit the defendant to continue to do the act complained of and restrained during the pendency of the suit.

State ex rel. Violett vs. Judge, 78.

The failure of the owner of the property who has joined with the tenant in an application for an injunction to perfect the injunction by giving bond does not destroy the right of the tenant, who is before the court standing on his own rights, and not depending upon those of the owner, to the benefit of the injunction, when he has himself given bond.

Id., 79.

A party who has been declared by a judgment of court as having failed to comply with his bid, and has not suspensively appealed therefrom, is without interest to enjoin the subsequent sale of the property under an order of court made in pursuance of said failure to comply with the terms of the sale.

Boyer vs. Sheriff, 767.

INJUNCTION—Continued.

The function of the writ of injunction in behalf of the public should only be exercised on the broad grounds of preventing irreparable injury, interminable litigation and the protection of a public right.

Board of Health vs. Cotton Mills, 807.

Where health is exposed, if there is a nuisance it should be abated even if injunction must be resorted to for its abatement.

Id., 814.

Where a party sues for a personal judgment for five thousand dollars as the stipulated penalty, or the damages fixed and liquidated for a violation in whole or in part of a contract not to do certain business for five years, and demands and obtains at the same time, against the other party, an injunction, likewise fixed as one of the remedies in the contract, restraining him from pursuing such business as an instrumentality to enforce specific performance—the demand, as presented and filed with the two remedies coupled, is an entirety and an inequitable one. The injunction should not be allowed. If allowed it can not be made good *ab initio* by a subsequent offer to discontinue a part of the demand.

Solomon vs. Diefenthal, 897.

INSANITY.

Death of the testatrix by suicide does not raise a presumption of insanity at date the will was executed. Even when the suicidal act is unquestionably the effect of insanity, it does not necessarily follow that a will prepared within a short time previous is invalid.

Succession of Bey, 774.

Proof of a notorious cause for interdiction must be made in order to defeat the payment of goods purchased at their value in due course of trade.

Schmidt & Ziegler vs. Ittman, 880.

INSOLVENCY.

In legal contemplation there is no debt of the tutor to the minor until the end of the tutorship and settlement of the tutor's ac-

INSOLVENCY.—Continued.

count. Hence, at a meeting of creditors of the tutor to elect a syndic, his vote can not be received based on the supposed debt to the minor, the tutorship still subsisting and there having been no settlement of accounts, and the law exacting that the debt on which the creditor votes at such meeting be fixed and certain. Revised Statutes, Sec. 1796; C. C., Art. 3086; 6 La. 462; 38 An. 15; 6 An. 224.

Nor, in another view, can the tutor vote at such meeting on a supposed debt due by himself individually to himself as tutor. He can not, as tutor, act against or sue himself individually. If the interests of the minor are at all concerned at the meeting of the creditors of the tutor, it is for the under-tutor to act for the minors. C. C., Art. 275; 12 An. 361; 29 An. 531.

It is contrary to the spirit of our law for the protection of minors, that the tutor seeking a discharge from his debts, should subject the minors to the operation of the insolvent laws, so as to affect their rights against him, least of all to cancel their mortgage against him, under the section of our insolvent laws directing the erasure of mortgages. Hence, the tutor can not, in our view, bring the minors before the meeting of the creditors by assuming to vote for them. C. C., Art. 3314; 33 An. 49; 29 An. 531; 31 An. 217; 12 An. 361.

Major vs. Creditors, 367.

Judgments homologating as far as not opposed the accounts of an administrator or syndic, fix the rank of creditors and order of distribution stated in the account and such judgments can not be disturbed by subsequent judgments except so far as concerns opponent, if his opposition is sustained. 14 La. 242; 7 N. S. 182.

The lessor's claim for rent and certain privileged debts rank the debt of the vendor of movables, and when the funds brought on the account it is manifest, leave nothing for such vendor after satisfying the privileged debts preferred to him—the judgment directing him to be put on the account will be reversed.

Searcy & Co. vs. Creditors, 376.

The decision of the District Court upon each of the claims, carried on the tableau, is a separate judgment in favor of each creditor.

INSOLVENCY—Continued.

This judgment must remain undisturbed, if the creditors accept it as correct and do not choose to appeal from the judgment reducing the amount. The syndic is without authority to appeal, for he is without interest and is not aggrieved.

Chapoton vs. Creditors, 412.

The respite is a judicial contract between the debtors and creditors and among the creditors. Therefore neither debtor nor creditor can take advantage of the other, and the creditors must remain on an equal and fair footing.

If the debtor does any fraudulent act to give an undue preference, *ipso facto* he becomes an insolvent, and the respite proceedings are converted into a cession.

Block & Co. et al. vs. Jefferies et als., 1104.

The placing by the insolvent, without intent to defraud, on his schedule claims which do not exist, and amounts which are to some extent exaggerated, does not amount to a fraud against other creditors within the meaning of the insolvent laws. The claims of these creditors are mere matters of legal right, subject to be disputed or controverted in the *concurso*.

In an accusation of fraud made against the insolvent, he has the right to trial by jury.

No opposition to a voluntary surrender, charging fraud, can be filed after the lapse of ten days next following the meeting of creditors.

The maxim *Contra non valentem agere non currit prescriptio* does not apply to the prescription of ten days for filing oppositions to a voluntary surrender.

Romano & Guerriero vs. Creditors, 1176.

The ten days allowed by law for the filing of opposition to the appointment of a syndic begin to run from the day on which the proceedings had before the notary are closed.

As to illegal votes cast affecting his discharge the insolvent must file an opposition within the prescribed ten days.

Henry vs. Creditors, 1428

INSOLVENCY—Continued.

In an open policy of insurance, in which an aggregate amount is expressed, there are as many contracts of insurance as there are endorsements on the policy of separate shipments of goods.

If the open policy contains all the conditions which govern the shipment of goods, specially insured under the policy, and the company reserves the right to reject or accept each special insurance in each shipment, the contract must be considered as made at the domicile of the company issuing the open policy.

Under such a policy the insurance company, having no agent in Louisiana, it can not be considered as doing an insurance business in the State.

There is a clear distinction between the business of an insurance agency, and the conducting of an insurance business.

State vs. Williams, 922.

INTERDICTION.

The person interdicted is like the minor, who is under a tutor. The administration of his estate is governed by similar rules.

The curator paid debts of the interdict; incurred for him; they were paid after the death of the interdict and after the curator's functions had expired. It would serve no useful purpose to cancel them and require payment of these amounts by the curator, to the executor of the interdict's succession, in order that he, the executor, may pay them to the creditors.

Interdiction of Onorato, 73.

When payments exonerate the estate from legal charges the executor must show that they are unfounded and excessive, or they will be allowed as a credit on the curator's account. *Id.*

See Insanity.

INTEREST.

See Homestead Associations.

JUDGMENTS.

Judgments homologating as far as not opposed the accounts of an administrator or syndic, fix the rank of creditors and order of distribution stated in the account, and such judgments can not

JUDGMENTS—Continued.

be disturbed by subsequent judgments, except so far as concerns opponent, if his opposition is sustained.

Searcy & Co. vs. Creditors, 376.

To sell the property of a defendant before any judgment against him is to exercise power which, if the courts can exercise it, should be exerted only in exceptional cases.

Adler & Co. vs. Lumber Company, 380.

The receipt by the appellant of a portion of the amount decreed to him by the judgment is acquiescence in the judgment and defeats the appeal.

Nor is this acquiescence at all affected because the appellant, receiving part of the amount of the judgment, undertakes to reserve his appeal. The reservation can not avoid the effect the law attaches to the acquiescence in the judgment.

Flowers vs. Hughes et al., 436.

A party who has been declared by a judgment of court as having failed to comply with his bid, and has not suspensively appealed therefrom, is without interest to enjoin the subsequent sale of the property under an order of court made in pursuance of said failure to comply with the terms of the sale.

Boyer vs. Sheriff, 767.

In a succession where the judgment of the court recognizes a party as sole heir, and in pursuance of this judgment and under order of the court the administrator pays the balance of the succession after paying debts to said heir, heirs subsequently appearing can not compel him to account to them and answer personally for said sum in default of filing said account.

Baron et als. vs. Baum, 1101.

The claim of a possessor in bad faith for alleged improvements is, at best, sparingly admitted; on the other hand he is liable for fruits during the entire period of his possession, and this court, without clear proof of same, will not disturb a verdict which compensates a claim for such improvements by the liability of the possessor for fruits, the verdict not being complained of by the plaintiff.

JUDGMENTS—Continued.

The verdict of the jury responds to the issues when the plaintiff suing for the land and its revenues, the defendant claiming the value of the improvements, the verdict determines that the demand for improvements is compensated by that for revenue, and the judgment following such verdict is unobjectionable.

Nor will such verdict and judgment be set aside merely because, after being charged, the jury were permitted to leave the court and separate before giving their verdict.

Railroad Co. vs. Elmore et als., 1237.

JURISDICTION.

See Courts.

LAND GRANTS.

The grant of lands by the United States in aid of a railroad, the State named as trustee for the road, the lands to revert to the United States if the road is not completed in ten years, the lands being identified by the grant and the listing approved, as directed by the act of Congress, vests title in the railroad company, although the road is not built within the limited time specified in the act, the grantor not insisting on the reversion, but accepting the subsequent completion of the road as compliance with the grant. Act of Congress 3d June, 1856; 11 Statutes at Large, 18; 21 Wall. 44; 41 An. 896; 42 An. 1019.

The State, a mere trustee, can not declare a forfeiture of the lands granted. Act 39 of 1879; 44 An. 984.

Those who settle on such lands in the face of the grant can not hold against the railroad company, and are possessors in bad faith, though the settlements are in contemplation of homestead entries and are made after the ten-year limit in the grant and the non-completion of the road within that period; for all gave notice that the grant by its terms takes effect from its date, and that conditions subsequent, i. e. the non-completion of the road, may be waived and can be insisted on only by the United States by declaring the lands open for entry, or equivalent act revoking the grant. C. C., Arts. 503, 3450, 3453; 42 An. 1019; 41 An. 896.

Railroad Company vs. Elmore et als., 1237.

LAWS.

A person who takes out policies in a foreign company having no agent here, and which does no business here, can not be made to pay a license which the company would pay if doing business.

It is within the power of the Legislature to define what acts of a person, in issuing and procuring the issuance of insurance policies, may constitute him an insurance agent. But after defining his occupation it is not within its power to make him pay a license for a foreign corporation whose business he undertakes.

The Legislature can not appoint by statute an agent for a foreign insurance company, for any purpose as its legally constituted agent, as it is in violation of Art. 236 of the Constitution.

The right to prohibit foreign corporations from doing business in the State without complying with Art. 236 of the Constitution carries with it the right to enforce the prohibition by appropriate legislation.

State vs. Williams, 922.

A criminal statute denouncing what is commonly called prize fighting to be a misdemeanor, punishable by fine and imprisonment, coupled with a *proviso* that the provisions of the act shall not apply to exhibitions and glove contests between human beings, which may take place within the rooms of regularly chartered athletic clubs, presents a question of fact to be determined by the court or jury, as to whether any given contest or series of contests come within the designation of the statute as a prize fight or within the scope and meaning of the *proviso* as a glove contest.

As the State of Louisiana is in court, seeking the forfeiture of the defendant's charter, on the ground that the corporation has committed acts *ultra vires* of its charter, and is met with the provisions of an act of her own Legislature which, in terms, authorizes just such contests as the witnesses describe the club contests to have been, this court will be excused for declining to disturb a finding of a jury in favor of the defendant on a question of facts.

Conceding such contests to be violative of good morals and of a sound public policy, the remedy comes plainly within the prerogative of the legislative department of the government, which alone can be looked to for relief.

State vs. Olympic Club, 935.

LAWS—Continued.

The prohibition of the statute of New York, to the effect that no second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extra-territorial effect, being a penal statute; and it can not be given the effect of annulling a contract of marriage between persons at the time residing abroad, notwithstanding it was solemnized in the city and State of New York—the contracting parties announcing their intention to be, to thereafter reside in Louisiana, and afterward actually residing there.

Succession of Hernandez, 962.

There is no grant of power to the city of New Orleans to change the general law and to transfer the responsibility for injuries resulting from defects in the public ways from the public to an individual who is not directly responsible for their existence.

Betz vs. Limingi, 1118.

The Legislature may delegate to municipal corporations power to adopt and enforce ordinances of special local importance, though general statutes exist relating to the same subjects.

The same act may constitute a crime against the public law of the State and also a petty offence against a municipal regulation. The two offences are different, and each may be punished without violating any constitutional right of the party accused.

Violations of city ordinances may be tried and punished summarily without information or indictment or trial by jury.

City of Monroe vs. Hardy, 1232.

The statute authorizing the revival and re-establishment of destroyed records could not and did not, as against third persons, give retroactive effect to a judgment so as to invest the party suing to reinstate with a right he did not previously possess.

Levy vs. Landry, 1368.

An act may be an offence under the laws of the State and subject to a penalty for violating municipal authority.

LAWS—Continued.

The power vested by legislation in a city corporation to make by-laws for its own government and the regulation of its police includes the power of punishing violations of its ordinances, though the offence be also denounced by State laws.

The violators of the ordinances of a corporation are sentenced to pay a fine without a jury. The offences being of minor importance and petty, they can not claim immunity from the penalty imposed by the ordinance by claiming the right to trial by jury before the District Court.

Carrying concealed weapons is an offence against the ordinances of the municipality, and as such is punishable by sentence of the Mayor's Court.

The corporate authority did not exceed their power by adopting a reasonable minimum penalty within the delegated power. The Legislature fixed the maximum penalty at one hundred dollars. The corporation observed that limit and added not less than five dollars. The minimum adopted by the ordinance does not make it illegal, being within the delegated power.

Board of Police and Mayor vs. Giron, 1364.

The certificate of the Assistant Secretary of State is competent evidence of the date of the promulgation of a law.

State vs. Clark et als., 1409.

In case the holder of a negotiable promissory note, in pursuance of an agreement between the maker and the assignee, makes a transfer thereof by written assignment without recourse, this assignment must be interpreted by the precepts of the Civil Code, and not by those of the law merchant.

Gumbel & Co. vs. Sheriff et al., 1499.

LEASE—LESSOR.

The real property leased to a commercial partnership creates *quoad* that property a joint and not an obligation *in solido*.

The transfer of a lease without stipulation does not carry with it other rights than those stated in the contract.

The lessor must bear the expense of extraordinary repairs rendered necessary by an overflow.

LEASE—Continued.

The inundation of the land was not unprecedented and gives no cause for reduction on rent account.

Hollingsworth vs. Atkins Bros., 515.

Where, pending a lease, work has to be done which should have been done prior to the lease in order to place the building leased in the condition in which it should have been to fulfil the lessor's warranty, that it was fit and appropriate for the known use to which it was to be applied, the lessee has a legal right to a dissolution of the lease.

The extent of the work to be done and the extent of the inconvenience to be suffered by the lessee do not control the rights of the lessee as to a dissolution. The warranty is indivisible.

Dean & Cazenavette vs. Beck, 1168.

No valid sublease of premises can be made without the consent of the lessor, when the lease prohibits the subleasing of the premises without the lessor's consent.

Meyer & Bro. vs. Rothschild & Co., 1174.

LEVEES—LEVEE DISTRICTS.

Under the present levee system of the State the riparian proprietor upon whose property a crevasse has occurred is not legally bound to close the same or to rebuild the broken levee. When a third person voluntarily furnishes materials and pays for labor in aid of closing the break, he can not call upon the owner of the land to reimburse to him his expenditures. To recognize such a right would be to practically return to the old system.

Railroad Co. vs. Turcan, 156.

Assessments of taxes to build and maintain levees under acts organizing and providing for Boards of Commissioners of levee districts, though treated as local assessments not subject to the rule of conformity, or the limitation applicable to general taxation, still are taxes within the purview of Art. 81 of the Constitution, giving to this court appellate jurisdiction in all cases involving constitutionality or legality of any toll, impost or tax whatever. Constitution, Art. 81; Acts No. 44 of 1886, No. 79 of 1890; Burroughs on Taxation, Chapter XXII; 11 An. 388, 222; 28 An. 323; 29 An. 460; 43 An. 389.

State ex rel. Hill vs. Judges, 1292.

LEVEES—Continued.

The tax of five mills imposed by the Levee Board of the Red River, Atchafalaya and Bayou Boeuf Levee District under the act creating said board is authorized by the Constitution. Constitution, Art. 214, Act No. 79 of 1890; No. 46 of 1892, Secs. 6 and 10.

The court again affirms that the acreage assessment for levee and drainage purposes, authorized by the acts creating the Levee Boards, is not within the scope of the limitations in the Constitution on general taxation. *Charnock vs. Levee Company*, 38 An. 327; 39 An. 455; 43 An. 15; 45 An. 1232.

Under these Levee Board Acts of 1890 and 1892 all alluvial lands within the districts subject to overflow are subject to this acreage assessment, except those reported by the engineers to be incapable of protection by the system of levees and drainage proposed by the acts. Secs. 1, 6, 10, 15.

The acreage assessment of five mills per acre is imposed on the theory that the expense of levees and drainage should be borne by all the lands, each acre bearing its proportionate share, the act supposing that it cost as much to drain one as it does another acre, and that each acre is benefited to the extent of its proportionate share of the expense; this acreage assessment without reference to the value of the land is approximative equality, perfect equality of taxation being unattainable; finds recognition in our past levee and drainage legislation and has had the sanction of our courts.

It is a legislative question to determine whether the alluvial lands of the State subject to overflow can be reclaimed by drainage and levees, and it is also the legislative function to prescribe the rule and objects of taxation to effect this reclamation. No court can set aside the legislative determination in this respect unless the legislation violates the organic law. *Cooley on Taxation*, Chapter 20, pp. 428, 429.

Hill et al. vs. Sheriff et al., 1563.

LIFE INSURANCE—ASSIGNMENT OF POLICY.

A policy of life insurance made payable to the assured, his executors, administrators and assigns, is, in law, assignable as any other incorporeal right. Such a policy does not constitute an asset of the "succession of a living person and become amenable to the denunciation of R. C. C. 2454."

Stuart et als. vs. Sutcliffe et als., 240.

LIFE INSURANCE—Continued.

In an action on a life policy, proofs of loss, stating suicide as the cause of death, are admissible, but not conclusive against the assured. Bliss on Life Insurance, Sec. 265; 142 U. S. 699; 22 Wallace, 36; 26 An. 404.

In such action, when the defence is self-destruction, the burden of proof is on the insurer to establish the suicide, and when circumstantial evidence only is relied on, the defence fails, unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another. Bliss, Secs. 366, 367; 47 N. Y. 52; 26 An. 404.

No such exclusion of any hypothesis save suicide can be predicated on the mere fact of the dead body of the person insured found with a mortal wound from a gunshot, the discharged pistol wedged on the thumb, "as if thrust in forcibly," and there being other circumstances inconsistent with self-destruction.

Leman vs. Life Insurance Co., 1189.

MALICIOUS PROSECUTION.

Where five persons unite in an action claiming ten thousand dollars damages against another for malicious prosecution and arrest, based on an affidavit charging them together with a violation of the 758th section of the Revised Statutes, the defendants against whom the judgment has been rendered properly appealed the case to the Supreme Court.

There may be illegal opposition and resistance to the execution of the process or order of the court, without the application of actual physical force or the use of words. Any conduct which would place the officer executing the order in bodily fear or terror, would constitute the illegal opposition and resistance contemplated by the law. Threats may be communicated by signs, by tones of voice, or by actions as fully as by word of mouth.

Where, upon an affidavit against certain parties, substantially true as to its facts, and where a District Judge, learned in law, before whom the affidavit is made, affixes a certain legal character to the acts charged therein, and issues a warrant of arrest as for violation of a particular statute—for acts that fall under that statute—but subsequently discharged the prisoners under the specific charge by reason of a change of opinion by him as to

MALICIOUS PROSECUTION—*Continued.*

the fallacy thereunder of the facts stated, the warrant and proceedings thereunder do not furnish the basis for a malicious prosecution and arrest.

Armstrong et als. vs. Railroad Co., 1448.

MANDAMUS.

The inspection and examination of the books and papers of a public office may be claimed on application for a *mandamus* by those who, by reason of their official position, have an interest in that examination.

Sheriff vs. Police Jury et al., 278.

A *mandamus* to compel the inferior court to hear witnesses to confirm a default will not issue when, since the application of plaintiff to confirm the default, the defendant in the lower court has filed his answer.

The writs under Art. 90 of the Constitution will not issue when it is apparent they can serve no purpose.

State ex rel. D'Amico & Sidotti vs. Judge, 365.

The affidavit made for the purpose of obtaining a writ of sequestration is *prima facie* evidence of the facts authorizing the writ.

Shingle and Lumber Company vs. Lorio, 441.

An appellant has the right immediately after the perfection of an appeal to demand a transcript of the case from the clerk, and the clerk must furnish it within a reasonable time after demand, otherwise he can be compelled to do so by *mandamus*. If, however, being in default, he, before a *mandamus* is taken out, tenders to the appellant a transcript duly certified, the appellant can not decline to receive it and *mandamus* the clerk as if he had refused absolutely to furnish it, on the ground that the transcript tendered was so defective that appellant's appeal might be dismissed on account of its imperfections. It is the duty of the appellant to receive and to file the certified record and protect his appeal by easy and familiar methods. Appellant can not collaterally raise and have determined on a *mandamus* the correctness of the transcript so tendered. Questions of that character must be raised and determined under different circumstances and conditions. When the clerk, under the circum-

MANDAMUS—Continued.

stances stated, being ordered to file a transcript on the first day of the term of this court, or show cause to the contrary, does so on the day named, an application for a *mandamus* based upon the contingency of a refusal must be dismissed at relator's costs.

State ex rel. Comeau, Administratrix, vs. Clerk, 1289.

In case a judicial sequestration, as an incident of a real action, is dissolved, and the plaintiff is left under the restraint of an injunction forbidding him to collect rents *pendente lite*, there is such probability of resulting injury therefrom that he is entitled to a *mandamus* to compel the allowance of a suspensive appeal from such interlocutory decrees.

State ex rel. Lamothe vs. Judge, 1407.

MARRIAGE.

All considerations in law and morals unite to the conclusion that a married woman should be held bound by her declarations in an authentic deed that she was a creditor of her husband for the price of the property transferred.

Duval and Wife vs. Roder, 818.

Donations between the spouses are revocable by mutual consent, and when revoked, the property returns to the estate of the donor freed from any claim of his heirs for their legitime, which might have attached to the property if the donation had not been revoked. Civil Code, Arts. 1493, 1559; *Scudder vs. Howe*, 44 An. 1103.

Abes and Wife vs. Davis, 818.

The prohibition of Art. 161 of the Code, to the effect that, in case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, is directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded.

The prohibition of the statute of New York, to the effect that no second or other subsequent marriage shall be contracted by any

MARRIAGE—Continued.

person during the lifetime of any former husband or wife of such person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extra-territorial effect, being a penal statute; and it can not be given the effect of annulling a contract of marriage between persons at the time residing abroad, notwithstanding it was solemnized in the city and State of New York—the contracting parties announcing their intention to be, to thereafter reside in Louisiana, and afterward actually residing there.

Succession of Hernandez, 362.

See Laws.

MINORS—TUTORSHIP.

In legal contemplation there is no debt of the tutor to the minor until the end of the tutorship and settlement of the tutor's account. Hence, at a meeting of creditors of the tutor to elect a syndic, his vote can not be received based on the supposed debt to the minor, the tutorship still subsisting and there having been no settlement of accounts, and the law exacting that the debt on which the creditor votes at such meeting be fixed and certain. Revised Statutes, Sec. 1796; C. C., Art. 3086; 6 La. 462; 38 An. 15; 6 An. 224.

Nor, in another view, can the tutor vote at such meeting on a supposed debt due by himself individually to himself as tutor. He can not, as tutor, act against or sue himself individually. If the interests of the minor are at all concerned at the meeting of the creditors of the tutor, it is for the under tutors to act for the minors. C. C., Art. 275; 12 An. 361; 29 An. 531.

It is contrary to the spirit of our law for the protection of minors, that the tutor seeking a discharge from his debts should subject the minors to the operation of the insolvent laws, so as to affect their rights against him, least of all to cancel their mortgage against him, under the section of our insolvent laws directing the erasure of mortgages. Hence, the tutor can not, in our view, bring the minors before the meeting of the creditors by assuming to vote for them. C. C., Art. 3314; 33 An. 49; 29 An. 531; 31 An. 217; 12 An. 361.

Major vs. Creditors, 367.

MINORS—Continued.

Where a sale is made, for the payment of debts, of property belonging to a succession in which minors have an interest, it is not necessary to observe the formalities required by law for the alienation of minors' property, the interests of the minors being residuary.

The Court, *ex-officio*, holds further, that though the property was sold in the succession for the payment of debts, and without the formality for the alienation of minors' property, the tutor, who is to receive the price, in the interest of all parties concerned, must furnish bond in the amount required by law.

Succession of Lange, 1017.

The legacies to minors may be held under a provision in the will to that effect and administered for their benefit by the executrix of the deceased, and not paid to them until their majority or emancipation. Succession of Macias, 31 An. 127; Strauss Succession, 38 An. 59.

Calvert, Tutrix, vs. Boullemet, 1132.

The law regarding *res judicata* makes no distinction; the minor himself, "when represented, is equally bound by the authority of the thing adjudged, the sanction of which is founded on the safety of society itself."

Ross vs. Enaut et al., 1256.

The court where the property is situated has jurisdiction of a suit to have property sold to effect a partition of property of which minors, who are absentees, are co-proprietors with major heirs who are present, and the surviving wife. 31 An. 572.

In the suit minors who are absentees are properly represented by a curator *ad hoc*.

Purchasers at judicial sales are protected by the judgment decreeing the sale.

Crawford vs. Binion, 1261.

Vendees of community property sold by a husband after the death of his wife without authority can not drive the heirs of the wife to an action against their father upon the minors' mortgage. The property remaining in kind, they have the right to recover it in a petitory action. The recourse which minors have against

MINORS—*Continued.*

their tutor's property was granted in their interest, and not as an instrumentality by which their rights could be overridden. Neither tutors nor administrators are permitted as a right to charge themselves with the value of the property belonging to the minors or to successions, and thus shift ownership from the minors and the succession over to themselves.

LeBleu et al. vs. Timber Co. et al., 1465.

MORTGAGE.

In case property is sent to sale under a senior mortgage, and there remains a surplus after the claim of the first mortgage has been paid, the purchaser is entitled to retain it and pay it over to the subordinate mortgagees when they present themselves.

A creditor holding a judicial mortgage only has no claim to or right upon this surplus, and is without right to call other creditors holding *special* mortgages into court for the purpose of discussing or distributing it. Much less has he the right to interplead in the original executory proceedings and compel the appearance of *special* mortgagees to try the *validity* of their demands with the purpose and object of having their nullity pronounced to the effect that his own be *advanced* to *first* in rank, and thus to be preferred in receiving payment.

Such a proceeding is not a *concursum*, but has the features of a revocatory action, and is amenable to the prescription of one year.

Denegre vs. Mushet, 90.

An act executed in the State of Michigan, between citizens of that State, and which, by the parties to the contract, is intended to operate as a mortgage on real estate situated in the State of Louisiana, same will be given effect as a conventional mortgage, affecting third persons after due inscription.

Gates vs. Garther et al., 286.

The mortgage accompanies the negotiable note which it secures, in its transfer to an innocent holder. The secret equities between the original parties can not affect his title to the sale, or impair its validity or that of the mortgage.

Lester vs. Sheriff et al., 340.

MORTGAGE—Continued.

While the stipulation in an act of mortgage that in the event suit becomes necessary for its enforcement the mortgagor is to pay attorney's fees, and only on the happening of that condition are such fees due, yet it is the duty of the mortgagee to make a timely legal tender of the principal and interest of the debt, in order to prevent the institution of suit, and save himself the payment of attorney's fees.

Simonds vs. Sheriff et al., 469.

The holder of a concurrent mortgage note has the right to assert his preference for payment on the proceeds of the sale of the mortgaged property over the transferrer, the payee of the note, by third opposition.

While it may not be necessary to make the mortgagor a party, it is not fatal to the proceedings if he is made a party defendant, and a personal judgment prayed for as against him. These matters concern the mortgagor and in no way affect the mortgagee, who is interested only so far as the opposition is concerned with contesting the preference claim of the third opponent.

If the agent of the maker of a mortgage note has no funds of the principal in his possession there is no reason why, on the request of the principal, he can not buy for his own account the mortgage note and hold it as security for the amount advanced for the principal.

If the agent has money of the principal in his possession and purchases the note, and makes a payment thereon with the funds of the principal, this payment will be considered as having been made by the principal, and the mortgage will be extinguished by confusion to the amount of the payment.

A mere endorsement of the note carries with it the mortgage security.

Gumbel & Co. vs. Boyer & Sheriff, 762.

A person against whose property a judicial mortgage was recorded acquired as forced heir an undivided one-third in a succession. In an act of compromise she transferred her undivided one-third interest to the instituted heir and owner of the remaining two-third interest.

The property being immovable the plaintiff, a judgment creditor, instituted the hypothecary action against the purchaser and third possessor of the undivided one-third.

MORTGAGE—Continued.

The recorded judgment against the heir affected the mortgageable property thus owned to the amount of the *residuum*.

The property subject to the mortgage, though transferred to the third possessor by the heir, is not free from all claims of the succession if it be shown that it was affected by a mortgage at the time of the transfer, but that the instituted heir bought it as not being subject to any judicial mortgage.

To establish the right of the judicial mortgage creditor, the amounts for which the indebted heir and judicial mortgage debtor is accountable should be deducted from the gross active assets.

The residuum accruing to the heir in the immovable property will be affected by the judicial mortgage.

Railroad Company vs. Fairer, 1022.

Where mortgaged property is seized in the hands of a third possessor, who consents to its seizure and sale, waives the thirty days' demand of payment on principal debtors, and the ten days' demand on him as third possessor thereof, and who also accepts service of notice of seizure, appoints an appraiser to estimate the value of the seized property, and is present at the sale offering no objection, but bidding thereon, he is estopped from attacking subsequently the validity of the sale for any defects or informalities in the proceeding arising anterior to the sale. 5 R. 523; 19 L. 311; 12 An. 838; 2 An. 593; 1 An. 11; 36 An. 774; 43 An. 323; 34 An. 886.

Where the third possessor of property seized and sold to satisfy a previous mortgage is not an heir of the defendant in execution, or interested in the distribution of the proceeds of the sale, he has no right to question whether the vendee paid the price, or whether the terms of the sale were complied with by him. 36 An. 774; C. P. 15. *Derouen vs. Hebert et als.*, 1388.

See Sale.

MUNICIPAL CORPORATIONS.

Municipal corporations are restricted by their charters with respect to the taxes the corporation may impose on property or occupations. See Burroughs on Taxation, Chap. 19, p. 381; 29 An. 261.

MUNICIPAL CORPORATIONS—Continued.

The Legislature may, by general act *i. e.* applicable to all such corporations, enlarge their taxing power—that is, without amending their charters, this enlargement of the taxing power may be effected by general legislation. 1 Dillon, Chap. 5, p. 169; Revenue Act 1890, No. 150, Sec. 14.

Legislative provisions conferring the taxing power on cities, towns and parishes are within the scope of the title of the act “To levy, collect and enforce payment of an annual license tax upon persons, associations or business firms and corporations pursuing any trade, profession,” etc. Act No. 150 of 1890; Const. La., Art. 29; Municipality vs. Michaud, 6 An. 606; Succession of Lambeth, 9 An. 333.

Mayor and Council vs. White, 449.

A municipal corporation can proceed by rule to compel the taxpayer to deliver to the tax collecting officer the personal property assessed, to the end of realizing, at public sale, the amount of the taxes, costs and penalties.

The remedy in this respect is similar to that of the State.

City vs. Insurance Company, 557.

If the property assessed “has been concealed, parted with or disposed of” by the tax-debtor, so that its seizure has been rendered impossible by the debtor’s acts, seizure of other property becomes possible. *Id.*, 558.

The Legislature may delegate to municipal corporations power to adopt and enforce ordinances of special local importance, though general statutes exist relating to the same subjects.

The same act may constitute a crime against the public law of the State and also a petty offence against a municipal regulation. The two offences are different, and each may be punished without violating any constitutional right of the party accused.

Violations of city ordinances may be tried and punished summarily without information or indictment or trial by jury.

City of Monroe vs. Hardy, 1232.

An act may be an offence under the laws of the State and subject to a penalty for violating municipal authority.

MUNICIPAL CORPORATIONS—Continued.

The power vested by legislation in a city corporation to make by-laws for its own government and the regulation of its police includes the power of punishing violations of its ordinances, though the offence be also denounced by State laws.

The violators of the ordinances of a corporation are sentenced to pay a fine without a jury. The offences being of minor importance and petty, they can not claim immunity from the penalty imposed by the ordinance by claiming the right to trial by jury before the District Court.

Carrying concealed weapons is an offence against the ordinances of the municipality, and as such is punishable by sentence of the Mayor's Court.

The corporate authority did not exceed their power by adopting a reasonable minimum penalty within the delegated power. The Legislature fixed the maximum penalty at one hundred dollars. The corporation observed that limit and added not less than five dollars. The minimum adopted by the ordinance does not make it illegal, being within the delegated power.

Board of Police and Mayor vs. Giron, 1364.

When it is alleged that a municipal corporation has executed a lawful power in an injurious and malicious manner, the presumption will be in favor of the propriety and good faith of the act of the corporation, and the plaintiff must make out a clear case of wilful oppression to obtain relief.

A municipal corporation is not liable for damages done to private property, unless the act was done without authority of law, or, being authorized by law, was improperly and wantonly executed.

Thibodaux vs. Town of Thibodaux, 1528.

See City of New Orleans.

NEGLIGENCE.

There is no restriction as to the number of trains, regular or special, which a railroad company may run over its lines, nor is there any law in this State, except in cities, to regulate their rate of speed.

NEGLIGENCE—Continued.

In the absence of statutory regulations common prudence will regulate the rate of speed in passing stations and crossings, and the degree of negligence will be determined by the facts in each case.

Where parties, from motives of business or pleasure, cross a track, before going on it they are required to exercise caution, care and prudence; to look and listen for an approaching train. If they do this it is not negligence to go on the track when no train is seen or heard approaching.

Where a party goes on a railroad track for the purpose of using it as a highway, he, to a certain extent, assumes all risks; it would require very gross negligence, amounting to malice, to make the railroad company liable to him; and this rule applies with greater reason when the injured party has a safer mode of travel by a public highway.

Greater care, caution and prudence are required of a deaf mute who goes on a railroad track than one in the full possession of all his senses. If he uses the raised bed as a highway, placing himself in a situation where hearing is one of the essentials of safety, it is negligence on his part. *Schernaydre vs. Railroad Co.*, 248.

The conductor put the car in motion before the passenger had time to step off, and as a consequence she was thrown from the step, fell to the ground and was injured; it is negligence for which the defendant company is liable for damages.

Liability by the principal arises when the servant is acting within the scope of his employment.

Plaintiff is entitled to compensatory damages.

Conway vs. Railroad Co., 1430.

There is a distinction between servants of a corporation exercising no supervision over others engaged with them in the same employment and employes clothed with the control of a department, with authority to employ and discharge the servants of a master.

Mattise vs. Ice Company, 1535.

The servant is supposed to know and assume the risk of his fellow servant's carelessness and negligence; but he does not risk the carelessness and negligence of those placed over him.

NEGLIGENCE—Continued.

He acts in a subordinate capacity. His duty is obedience. He relies on the care and judgment of his superiors.

A corporation is liable for negligence respecting duties it is required to perform as master.

The agent entrusted with their performance occupies the place of the corporation, deemed present.

The engineer in charge of the machinery and of the ammonia department of the plant was informed of a "bag" formed on the shell of a boiler, that exploded three hours after he had been informed.

The boiler was not "cut off" and put out of service as required to avert accidents.

Id., 1536.

In an action for damages against a railroad company by the surviving parents for the loss of their son run over and killed by the locomotive, the defence of contributory negligence will not avail, if by reasonable care on the part of those in charge of the train the accident could have been avoided. 2 Thompson on Negligence, 1105, 1108; Patterson's Railway Accident Law, 51, 55; 144 U. S. Reports, 429.

The obligation of reasonable care to avoid accidents on railroad tracks running through cities rests on the railroad companies, although the tracks are laid on an embankment the property of the company. Pierce on Railroads, 330; 1 Thompson on Negligence, 449.

McGuire et al. vs. Railroad Co., 1543.

See Damages; Evidence.

NUISANCE.

The law does not limit its protection to parties who are aggrieved in dollars and cents by a continuing nuisance. The fact that the plaintiff in injunction does not own the premises which he occupies, but occupies them as a tenant, does not withdraw from him and his family the protection of the law against a nuisance affecting their health and comfort.

State ex rel. Violet vs. Judge, 79.

NUISANCE—Continued.

A civil action on behalf of the public will lie if the nuisance is public. A nuisance *per se* which affects the health may be abated, and under proper limitations and restrictions a writ of injunction may be issued.

Board of Health vs. Cotton Mills, 806.

OBLIGATION.

In cases of flood, as in those of conflagration, services rendered voluntarily to preserve another man's property from destruction are presumed to be gratuitous and give no cause of action.

Railroad Co. vs. Turcan, 155.

The possessor of land or tenements is not at liberty to plant in them dangerous instruments, which may seriously injure trespassers, but he is under no duty to keep his premises in a safe condition for other persons than those whom he invites—and, consequently, he is not liable to trespassers for injuries they may receive from defects not amounting to traps in such premises.

Fredericks vs. Railroad Co., 1180.

OFFICE—OFFICER.

The inspection and examination of the books and papers of a public office may be claimed on application for a *mandamus* by those who, by reason of their official position, have an interest in that examination.

In view of the relations of the sheriff as the collector of parish taxes and licenses, and that he is required to settle for his collections with the parish treasurer, who settles with the jury, the police jury must be deemed to have an interest in the examination of the sheriff's books and papers whenever the information to be elicited becomes necessary for settlement of the jury with the parish treasurer or for other purposes within the scope of the duties of the jury. 1 Greenleaf on Evidence, pp. 471, 473.

Sheriff et al. vs. Police Jury et al., 278.

The "veterinary surgeon" mentioned in Sec. 6 of the ordinance creating a paid fire department for the city of New Orleans is an officer of the department and holds his office during good behavior.

OFFICE—*Continued.*

The Board of Commissioners was absolutely without power or authority to displace a veterinary surgeon who had been elected and qualified and was in the discharge of his duties as such, by the election of another person, the officer having neither resigned nor been impeached. Such election was absolutely null, carrying with it no legal effects.

The officer attempted to be displaced through such an election by the board was authorized to ask and the court justified in granting an injunction in his favor restraining the newly elected surgeon, the Board of Commissioners and the chief of the department from interfering with him in the performance of his duties.
Wheeler vs. Fire Commissioners., 731.

The provisions of Article 201 of the Constitution, that for any of the causes enumerated in Article 196, district attorneys, clerks of court, sheriffs, coroners, recorders, justices of the peace, and all other parish, municipal and ward officers, shall be removed by judgment of the District Court of the domicile of such officer (in the parish of Orleans the Civil District Court), are not exclusive of all other methods by which municipal officers may be displaced. The power granted by the General Assembly in Secs. 58 *et seq.* of the charter of New Orleans to the Common Council to remove the recorders of the Recorders' Courts by impeachment proceedings is constitutionally granted.

State ex rel. Whitaker vs. Adams et al., 830.

The mayor of the city is incapacitated to enter into an act of compromise, and bind the city thereby, unless specially authorized by competent authority, and he can not, by acting under such a compromise, estop the assertion of the city's legal rights.

City vs. Board of Administrators, 863.

An officer who acts strictly within the duties imposed upon him by law is not responsible individually for acts committed in the discharge of official duties.

Thibodaux vs. Town of Thibodaux, 1528.

OWNERSHIP.

A patent for public lands reciting that a named party has purchased all the unsurveyed sea marsh in a certain township and range,

OWNERSHIP—Continued.

west of the Mississippi river, excepting certain surveyed lots situated on the river, containing a certain number of acres, and extending back to a certain named bay, according to the official plat of the survey of said lands, in the State land office, does not evidence a sale *per aversionem*.

State vs. Buck and Fruit Co., 656.

The title to alluvion is a purely accessory right attaching exclusively to riparian proprietorship and incapable of existing without it. The very object, purpose and scope of Act 104 of 1888 is to authorize the register of the State land office to cancel the entry last made when there are two conflicting patents outstanding to the same identical land. It does not confer upon him authority to hear and determine such a controversy as this. *Id.*

PARTITION.

See Community of Acquets and Gains; Minors; Pleading and Practice.

PARTNERSHIP.

The responsibility of a partner may exist, though it was not known by the creditor that he was a member of the partnership.

Whenever the parties intend a partnership between themselves, they are, or at least may be held to be, partners as to third persons. Story on Partnership, Sec. 49.

The existence of a dormant partner may be unknown to the creditor, and yet he may be held liable to the extent of his responsibility as a partner. Lindley on Partnership, Vol. 1, p. 339.

The secret partner can escape liability only by the failure of the creditors to discover the relation he holds to the business. *Chaffraix & Agar vs. Lafitte & Co.*, 80 An. 631.

Schmidt & Ziegler vs. Ittman et al., 894.

An action to recover the amount of alleged debts paid and advanced for another, is an action for the settlement of a partnership, and is prescribed by ten, not by one, three or five years. Civil Code, Arts. 3358, 3554; Act of 1888, No. 76; 12 Rob. 148.

Reddick vs. White, *1199.

See Citation.

PLEADING AND PRACTICE.

When a legal proceeding is commenced against a person, whether resident within the jurisdiction of the court in which it is begun or not, the defendant must be brought in court, in some one of the forms provided by law, or a voluntary appearance must be made on his behalf that jurisdiction may attach.

When the proceedings are on a bond for the appearance of an accused, the call on the principal and surety, by the sheriff under the order of court, must be made in order that the judgment pronounced may be valid. This formality is jurisdictional.

The plaintiff in injunction, having alleged that there was no process whatever, and having complied with prerequisites by taking the oath required and furnishing bond to obtain an injunction, the court of her domicile has jurisdiction to hear the cause on the merits.

Sheriff vs. Judge, etc., 29.

In case property is sent to sale under a senior mortgage and there remains a surplus after the claim of the first mortgagee has been paid, the purchaser is entitled to retain it and pay it over to the subordinate mortgagees when they present themselves.

A creditor holding a judicial mortgage only has no claim to, or right upon this surplus, and is without right to call other creditors holding special mortgages into court for the purpose of discussing or distributing it. Much less has he the right to interplead in the original executory proceedings and compel the appearance of special mortgagees to try the validity of their demands with the purpose and object of having their nullity pronounced to the effect that his own be advanced to first in rank, and thus to be preferred in receiving payment. Such a proceeding is not a *concurso*, but has the features of a revocatory action, and is amenable to the prescription of one year.

Denegre vs. Mushet, 90.

The remedy to correct the alleged illegality in the appointment of a receiver is by rule to set aside and vacate the order of appointment, and, if the rule be denied, to appeal from the decision.

Whether the company consented legally is a question of proof to be considered on trial of a rule.

State ex rel. Brewing Co. vs. Judge, 100.

PLEADING AND PRACTICE—Continued.

It is only a "conflict of privilege" between creditors that the statute (Rev. Stat., Sec. 1942) contemplates, or by which authority is conferred upon courts to classify, "according to their rank," in the summary manner pointed out; it does not purport to give the courts jurisdiction to summarily adjudge the validity of debts which are secured by privileges or mortgages, and by that means to displace one and advance the rank of another. It does not purport to authorize mere strangers to the principal litigation to be thus summarily coerced into court and compelled to submit their claim to investigation and judgment on simple rule without their having resorted to any judicial proceedings looking to the assertion of any claim on the proceeds of sale in the possession of the court.

Denegre vs. Mushet, 97.

Where a party appears and excepts to want of citation in a cause, which is overruled, and he then, reserving his rights under the exception, files a plea to the jurisdiction, the latter plea is not such an appearance as will cure the want of citation.

State ex rel. Police Jury vs. Justice of the Peace, 117.

In case the wife, sued for divorce, sets up, by way of reconvention, a counter demand for a separation, it is competent for the plaintiff to rebut the defendant's evidence by the introduction of evidence pertinent thereto, notwithstanding it be inapplicable to his principal demand, which has been disallowed.

No formal answer to or denial of the averments of the defendant's reconventional demand is contemplated in our law, and the plaintiff may introduce any evidence in rebuttal or disavowal of same, in the same manner, and to the same extent that he might under a formal denial thereof.

Suberville vs. Adams, 119.

It is a general but not an inflexible rule that prior to the modification or rescission of an order of injunction, notice should be given to the party who obtained the writ. Where the rule is departed from it is proper that such notice should be subsequently given, to the end that parties may guard their interests and rights.

State ex rel. Lehman vs. Judge, 163.

PLEADING AND PRACTICE—*Continued.*

The contention is not well founded that a judge of a Civil District Court who grants, prior to allotment, an order of injunction, in so doing, exhausts his power over the order and is without authority, subsequently and prior to allotment, to modify or rescind the same. Until allotment he, for legal purposes, retains control of his own order.

Where such a second order has been granted and it is sought to have the same reviewed under a writ of *certiorari*, the judge of the particular division of the court, who has at the time of the application for the writ, control of the case by allotment, is the proper judge before whom to test contradictorily the order complained of. *Id.*

Where a widow sues for damages resulting from the death of her husband, caused by negligence of defendants, there is no misjoinder of parties plaintiff, if she sues individually and as tutrix of her minor child, issue of her marriage with deceased.

Where the parties are liable *in solido*, and each is cited, they are all before the court, and the fact that the petition alleges that the injury was inflicted by a commercial firm, composed of the individuals who are liable, is not sufficient for the dismissal of the suit, although the firm had been dissolved at the time of the institution of the suit. The petition discloses a cause of action when it sets out the manner in which the deceased was killed and charges negligence on part of the defendants, and the absence of contributory negligence on part of deceased.

Helm, Tutrix, vs. O'Rourke, 178.

Defendant in possession claiming title has the right to require that plaintiff not only show a better title than his own, but a title as good as any the latter can oppose to him, whether vested in defendant or not. This outstanding title must be a legal subsisting and better title than the plaintiff.

Where defendant does not claim to hold himself under that title, but avers that it is vested, not in plaintiff, but in others, his contention is repelled by a judgment having the force of *res judicata* rendered contradictorily between the parties themselves which decreed the plaintiffs to legally own the same.

Font vs. McConnell, 215.

PLEADING AND PRACTICE—*Continued.*

In a suit for damages for the death of a person alleged to have been caused by the negligence of the employes of a railroad company, where the plaintiffs allege themselves to be the widow and children of the deceased (the widow suing for herself individually and for the minors as their mother and tutrix,) defendant is not entitled under an unrestricted offer or tender of evidence to introduce generally and against all the plaintiffs an extra-judicial admission made by the mother since the institution of the suit, that she was not married to the deceased, when prior to this admission she had testified as a witness in the case that she was his widow. Had she sued alone and in her own behalf, such an admission, if legally proved, was admissible against her. *Quoad* admissions made by her as affecting herself, her *status* as a party was not merged into that of a witness.

Jackson, Tutrix, vs. Railroad Company, 226.

An exception that the petition of a corporation does not show that suit was authorized, will be overruled if the affidavit accompanying the petition discloses the name of the vice president of the company, and affirms the truth of its allegations, the necessary inference therefrom being that the suit was apparently authorized.

Lacaze & Reine vs. Creditors, 237.

Where it appears by the allegations of a petition, taken as true for the exception, that the defendant company carried the plaintiff, a passenger, beyond his point of destination; that he was forcibly put off at a point at which there was no station;

The wrongful act was, if truly alleged, a trespass, actionable in the parish in which the passenger was thus ejected.

Dave vs. Railroad and Steamship Company, 273.

The plaintiff in a suit *via executiva*, having been enjoined, on the ground that there was a deficiency in the measurement of the land sold by her, interposed the plea of no cause of action.

She has not thereby waived any of her rights to answer and to trial on the merits.

Gughlielmi vs. Geismar, 280.

PLEADING AND PRACTICE—*Continued.*

In case an absentee is sought to be reached and affected by a decree appertaining to real estate situate here, the appointment of a curator *ad hoc* to represent him is jurisdictional, and the *modus operandi* of appointment must closely conform to the Constitution and law, on the pain of nullity.

Gates vs. Gaither et al., 286.

Before the court sustains an exception filed by a defendant his legal interest to take the particular exception must appear.

Plaintiff in bringing a petitory action is not necessarily forced to cumulate therewith an action of nullity to set aside judicial proceedings in which apparently his title in the property has been divested. He has at his risk the right to allege such proceedings to be absolute nullities and to go to trial on that issue.

Belard & Johnson vs. Gebelin et al., 326.

Heirs of Ford vs. Mills & Phillips, 331.

In proceedings before the City Courts no default preliminary to judgment against defendant is required. Code of Practice, Arts. 582, 583.

Nor can these courts by their rules require such default.

State ex rel. D'Amico & Sidotti vs. Judge, 365.

Where a matrimonial community of acquets and gains exists and the wife dies and her succession is opened by the qualification of the husband as natural tutor of his minor children issue of his marriage with the decedent, a creditor who has obtained a judgment on a community debt can not compel an administration of the wife's succession. His remedy is to proceed against the surviving husband and the community property.

Succession of Hooke, Wife of Ashbey, 353.

In a possessory action, where the plaintiff annexes a deed to his petition, made a part thereof, for the purpose only of showing the nature of the possession, that fact will not impress the action with the character of a petitory one.

In a possessory action only the fact of possession and the action thereof can be considered.

Planting and Manufacturing Co. vs. Higgason, 425.

PLEADING AND PRACTICE—Continued.

The State can not be sued before her own tribunals without her consent—the question is not affected by the fact that the claim is a demand in reconvention, set up in a suit brought by the State. *State vs. Bradley*, 37 An. 623.

State vs. Gaines et al., 431.

An exception of prematurity is not waived nor merged in the answer by a consent to have the same referred to be tried with the merits, particularly where the answer filed is under reservation of the exception.

Murray et al. vs. Succession of Spencer et al., 452.

In case the *original* suit and sequestration have proceeded on the theory that the debt is due at the time of filing, a *supplemental* petition alleging the new and substantial fact that the debt has *become due since the suit was filed* changes the substance of the original demand in an important particular.

Egan vs. Fush, 475.

A third opponent, contesting the rank of plaintiff's privilege, as well as the *bona fides* of his claim, must stand or fall by his allegations. Reserving the benefit of a suit against the defendant, he had previously filed, prevents his taking anything, by way of opposition, that he seeks advantage of in such pending suit. Third opposition in one court can not be used or employed as an accessory of another suit in a different court.

Austin vs. Williams, 509.

A substantial compliance with the provisions of the law (Act 37 of 1882) in reference to third persons claiming personal property seized, is all that can be required. Making affidavit as to the character of the ownership thereof with a view of demanding a bond of indemnity is such compliance. When the civil sheriff refuses, after such a notice, to proceed with a sale under execution until bond shall have been furnished by the seizing creditor, the court will not disturb the ruling of the lower court, refusing to set aside seizure, but staying execution until further orders.

Graveley vs. Ice Machine Co., 549.

PLEADING AND PRACTICE—Continued.

In the suit for slander of title if the defendant sets up title, he changes the character of the action. It becomes a suit to try titles in which the burden of proof to maintain title is on defendant as in the petitory action.

McConnell vs. Ory, 564.

The "judgment by default" did not conclude the parties and cut off a renunciation by them of their mother's succession—such a judgment not being definitive in its character.

The tacit admission resulting from the judgment by default disappeared at once upon the filing of the disclaimer without the necessity of a formal setting aside of the default by motion.

It was not necessary, in order to prevent judgment being rendered against these parties as heirs of their mother, that they should have renounced her succession by notarial act; the paper filed by them sufficed for that purpose. Defendants owed no duty to plaintiff—were not its debtor and could not be forced against their will to accept the succession.

The parties cited having, however, not disclaimed being heirs of their BROTHER, but allowed a definitive judgment to be given against them as such, must be held to have accepted HIS succession, and they, as such heirs, represent directly an interest in the interest formerly held by him.

The immediate heirs of the mother having renounced her succession and there being no others known, plaintiff and the court are warranted in acting upon the assumption that the interest which had been cast upon the mother had devolved upon the sister and the three brothers by reason of accretion and the indivisibility of their acceptance of their brother's succession.

A sale by licitation made contradictorily with the parties now before the court will convey a legal title to the purchaser.

Bank vs. Choppin et al., 630.

Notwithstanding property in dispute in a petitory action be situated in the parish of Plaquemine, the Civil District Court of the parish of Orleans acquires full and complete jurisdiction *ratione materiæ et personæ* if the parties claiming ownership be personally cited therein—same being citizens of another State.

PLEADING AND PRACTICE—Continued.

An exception to the jurisdiction of the court *ratione personæ* to be availing must be tendered *in limine* and disencumbered by any other issue. *State vs. Buck and Fruit Co.*, 656.

The police jury of Bienville parish was properly made a party defendant in the contest of an election held under Act No. 88 of 1892, by citation upon its president. *Lucky et al. vs. Police Jury et al.*, 679.

Costs follow the judgment, and therefore it is not necessary for parties to whom costs are due to appeal.

When the court orders costs to be taxed against a defendant the plaintiff has not such an interest in the matter as to be entitled to notice of the granting of the order. If the party to whom the costs are due appeals from the order it is not necessary to make plaintiff a party thereto.

An attorney at law is presumed to know what transpires in the litigation in which he is employed so far as it affects his interest. If he permits his associate to claim docket and deposition fees in the Federal courts and an order in his favor is rendered for the same, the party owing the fee will be protected in paying according to the terms of the order.

Succession of Gaines, 695.

An agreement of settlement or compromise of claims against a succession, pleaded and maintained as a bar against a suit on such claims, can not be afterward used as a defence against the suit on the agreement itself. *Willow vs. Suarez*, 715.

Though the issues raised in an opposition to an administrator's account may be such as to require to be disposed of by a direct action, the opposition may stand by way of notice.

In proper cases where the result of a pending suit is dependent upon the decision in another, proceedings in the first may be stayed to await that decision. *Succession of Trozler*, 738.

The holder of a concurrent mortgage note has the right to assert his preference for payment on the proceeds of the sale of the mortgaged property over the transferrer, the payee of the note, by third opposition.

PLEADING AND PRACTICE—Continued.

While it may not be necessary to make the mortgagor a party, it is not fatal to the proceedings if he is made a party defendant, and a personal judgment prayed for as against him. These matters concern the mortgagor and in no way affect the mortgagee, who is interested only so far as the opposition is concerned with contesting the preference claim of the third opponent.

Gumbel & Co. vs. Boyer & Sheriff, 782.

Whether a petition has, or not, stated a cause of action must be ascertained and determined from examination and analysis of the petition itself, and the test is, whether if all the allegations be taken as true—for the purposes of the exception—the petitioner would be entitled to judgment.

Paper Company vs. Watson et al., 795.

Creditors in a respite can not sue to have property returned to the debtor's estate for their individual benefit. Any action in another direction by an individual creditor will inure to the benefit of all the creditors.

If no opposition is made to a respite in ten days it can not be set aside. The alternative is to convert the proceedings into a cessation of the debtor's property.

Block & Co. et als. vs. Jefferies et als., 1104.

A written notice to the creditor in respite proceedings is essential, but when the debtor informs the creditor of his intention to ask a respite, and the creditor answers that he does not wish to participate in the proceedings for fear of losing some advantage, but will not take steps against the debtor if the creditors agree to give time, the creditor can not after the respite is granted, because of want of notice, seize the property placed on the schedule. To all intents and purposes he consented to the respite.

Id., 1105.

After issue joined, the filing of an exception of no cause of action will not be heard to defeat the admissions of the answer.

The exception must be decided with reference to the issues at the time it is filed.

Homestead Company vs. Lénigan, 1119.

PLEADING AND PRACTICE—Continued.

Where the wife of one of three joint owners of property dies, leaving a will in which she admits that the interest in that property standing in her name belongs to the community of acquets and gains, there is no necessity, in a suit brought by the other joint owners to effect a partition, that the surviving husband should be made a party in his capacity as testamentary executor of his wife as well as personally and as tutor of his minor children, the wife's half of the property being left exclusively to the children.

Hewes et als. vs. Baxter et al., 1280.

Parties without titles, occupying lands, may be joined as defendants in a suit for the lands by plaintiff asserting ownership. 2 Howard, 644; 1 Woods, 621; 28 An. 644.

Railroad Company vs. Elmore et al., 1237.

If, in answer to a petitory action, the defendant urges pleas of estoppel, and therein incorporates an exception of the want of proper parties defendant, which pleas and exceptions are repeated by warrantors when cited, it is better practice to refer same to the merits to stand as parts of the answers of the warrantors when filed. And this is particularly true when plaintiff, in his petition, has denied the existence of the facts on which the pleas of estoppel are founded, necessitating the administration of proof.

Dauterive vs. Opera House Association, 1316.

In a petitory action it is competent for the plaintiff to set up the *absolute nullity* of any antecedent judicial proceedings, with the view of disembarassing the title under which he asserts ownership of property, without formally making the participants therein parties to the suit.

A clear distinction is taken between a petitory and a revocatory action in this respect.

Id., 1317.

The surviving widow in necessitous circumstances may urge her preference claim for one thousand dollars by way of third opposition to executory proceedings by one of her deceased husband's special mortgage creditors—the death having supervened pending the sale of the property.

PLEADING AND PRACTICE—*Continued.*

The court having granted an order directing the sheriff to withhold from the proceeds of sale a sufficient amount to cover opponent's demand, her privilege may be executed against same after the sale is made—her privilege being transferred to the proceeds of sale. *Comeau vs. Miller*, 1324.

When the verdict is defective in point of form, because it does not expressly pass upon the plaintiff's claim, but on the reconventional demand for a sum, that presumably was found for defendant after having considered plaintiff's demand, the case will not be remanded. The Supreme Court will render such judgment as should have been rendered by the jury.

Bloch vs. Creditors, 1336.

The court again recognizes that in the petitory action the plaintiff must recover on the strength of his title, not on the supposed weakness of that of the defendant.

Chachere et als. vs. Bloch, 1386.

Where the third possessor of property seized and sold to satisfy a previous mortgage is not an heir of the defendant in execution or interested in the distribution of the proceeds of the sale, he has no right to question whether the vendee paid the price, or whether the terms of the sale were complied with by him.

Derouen vs. Hebert et als., 1388.

It is too late to intervene in attachment proceedings to obtain a reversal of an interlocutory order for the preservation of the property after the order has been granted and the conservatory process fully complied with.

State ex rel. Vietor & Acheles et als. vs. King, Judge, 1421.

Where defendant in a petitory action who has been in the exclusive possession of certain property reconvenes directly against a plaintiff, who seeks simply to be recognized as a joint owner with him in the property for the price of the improvements, which he claims to have been placed on the property while having such possession, he is correctly remitted for the ascertainment of his rights to an action of partition between the joint owners.

LeBleu et als. vs. Timber Co. et als., 1465.

PLEADING AND PRACTICE—Continued.

In a petitory action, where plaintiff alleges the absolute nullity of certain tax sales under which it is assumed defendant will attempt to set up title, it is not necessary to make all the parties to those sales parties to the action. *Belard & Johnson vs. Gebelin*, 46 An. 326; *Heirs of Ford vs. Mills & Phillips*, *Id.*, 331; *Dauterive vs. Opera House Association*, *Id.*, 1317.

Though a defendant without title be authorized in a petitory action to set up an outstanding title in a third person against plaintiff's demand, such title must be a valid legal subsisting one. He can not eke out the defective title of a third person by invoking prescription in its favor. That plea belongs to the party acquiring by that title and those holding under him, not by a person not in privity with him.

A joint heir or joint proprietor can sue and maintain a petitory action against a mere possessor without title for the whole undivided succession or property. *Mays vs. Witkowski*, 1475.

Claim may be made in same suit for the wages of an overseer, the value of crops disposed of, that of supplies and money furnished to make and gather a crop of rice, and for the use and hire of teams employed thereon, and the board of laborers—the allegations and proof disclosing that the plaintiff was at one and the same time overseer for the defendant on one plantation and that the two were engaged in the cultivation of another on shares. All of these items are matters properly embraced in one general plantation settlement between the parties.

Plaintiff disclosing the fact that the contract relative to planting a crop on shares was made and entered into by and between the plaintiff and defendant alone, the former, on the trial of an exception of want of proper parties, is capacitated to sue the latter in the enforcement thereof, notwithstanding the former subsequently made an agreement with a third person whereby he was to share his interest—the defendant not being advised of such subsequent agreement, and consequently not participating therein. *Torian vs. Weeks*, 1502.

On the issue of ownership, defendant, relying on titles which, it is claimed, inadvertently omit one of the lots of the plantation, the subject of the sales, the error may be alleged in an amend-

PLEADING AND PRACTICE—*Continued.*

ment to the general issue contained in the original answer, the amendment not changing the issue. Code of Practice, Arts. 419, 420; 2 Hennen's Digest, 1182, No. 9; Payne vs. Railroad, 38 An. 164. *Gladdish vs. Godchaux*, 1571.

PLEDGE.

Pledge is not made perfect by the consent of the parties; it requires absolute possession.

A pledge can not be made perfect by the sub-lessee's delivery of possession without the consent of his lessor.

The obligation of the lessor to account for the property and whatever revenues were realized therefrom, binding between him and the creditor claiming pledge, the property not having been delivered, did not affect his other creditors, who could seize the property in the possession of the lessor, or in that of his sub-lessee, who held possession for the lessor.

Bank vs. Janin, 995.

Delivery of the property pledged to the creditor, or to the third person to hold possession for the creditor, is indispensable to perfect the contract of pledge, and when delivered to the third person he must, of course, know of the trust and accept the obligation it imposes. Civil Code, Arts. 3133, 3152, 3162; Code Napoleon, Art. 2076; Laurent Droit Civil, 28th Vol., p. 162, pars. 464, 470, 471, 484; 3d Mourlin Examen du Code Napoleon, p. 482, par. 1218, Sec. 3; 7th Boilleux Commentaire du Gage, p. 129; Jones on Pledges, Secs. 23, 27, 28, *et seq.*

Hence, no pledge is accomplished by the debtor executing his note in favor of his creditor, attaching bonds and certificates of stock to secure its payment, placing note and securities in a package marked with the creditor's name in the box of the debtor in bank, the debtor at the same time instructing his clerk having the key of the bank box to deliver the package on the request of the creditor; and although the instructions are communicated to the creditor, and all is done in pursuance of a pledge promised the creditor, but no delivery ever having been made, and when the debtor dies the securities remaining in his bank box deposited and held as his property. *Ibid.*

Succession of Lanauz, 1036.

PLEDGE—Continued.

In such case, the clerk of the debtor, because he receives the instructions of his employer to deliver the securities, and communicates such instructions to the creditor, does not become "the third person agreed upon" to take possession of the securities for the creditor, required by the Code when the pledge is proposed to be perfected by that method of delivery; least of all can we hold that by such instructions and their communication is any shadow of possession passed to the clerk of securities in his employer's bank box, never taken from it until his death, when his executor takes charge of box and contents. *Ibid.*

Instructions of an employer to his clerk, with reference to the delivery of the employer's securities to one of his creditors, and communicated to the creditor, whatever their force in the life of the employer, certainly cease to have any effect when the death of the employer occurs, no delivery having ever been made.

Death of the debtor fixes the rights of his debtors as they exist at that moment, and a proposed pledge, not perfected by delivery when the debtor's death occurs, confers no rights. 1 H. D., p. 686, Insolvency IV, No. 7; 2 H. D., p. 1504, *i. e.*, Delivery; O. C. 3183, 3152, 3162, 3182, 3183, 3185; 12 Rob., p. 248, and authorities cited on page 1053.

Id., 1037.

POLICE JURY.

Police juries have the capacity to buy the property of delinquent tax debtors seized, sold and adjudicated at sheriff's sale under the judgment and execution of the jury against the delinquent. Const., Art. 118; R. S., Secs. 3321, 351, 354; 2 H. D. 1157, No. 1, *et seq.*

Parish of Concordia vs. Bertrou, 356.

POLICE POWER.

Under the police power and the statutes delegating authority to the municipality, the City Council may protect health by prohibiting the adulteration of milk, and may adopt ordinances to that end.

Such ordinances are not open to the objection that they transcend the limits of municipal authority; the purpose being the protection of public health.

POLICE POWER—Continued.

To secure such a purpose persons and property are subjected to many restraints and burdens.

Those who directly feel the restraints and burdens are presumed to be rewarded by the common benefit secured.

The ordinances were designed to insure the purity of an article of food upon which many families are dependent. It is of universal consumption.

The police regulations upon the subject are designed to prevent fraud and protect health.

Under the police power and the delegated authority the ordinance of the council relating to the necessity of selling pure milk is legal and the fine was legally imposed.

These ordinances, without proof to the contrary, are not unreasonable. The standard adopted to test the purity of the milk can not operate to the exclusion of all other evidence upon the subject.

Upon proof of the unreasonableness of the standard, that part of the ordinance relating to standard of purity of milk would be illegal and amenable to the charge of unreasonableness.

State vs. Stone, 148.

The City Council of New Orleans has the unquestioned authority to designate a place where perishable food may be sold, such as meats, fish, fruits, vegetables, etc.; to regulate the police of the market places, to lease the same, not for the purposes of revenue solely, but in order to maintain the market buildings and the police of the same. And for this purpose to authorize the lessee to charge a reasonable sum for stalls and space.

Because one raises his own produce gives him no right to sell it in violation of a city ordinance. .

The city ordinance regulating the markets must give free access to the markets and afford proper facilities to persons who desire to sell goods which the ordinance requires to be exposed for sale there. The ordinance must be impartial, making no discriminations and creating no monopolies, and offering no serious impediments to trade.

State vs. Sarradat, 700.

PRESCRIPTION.

Debts of the heirs, like donations to them by the ancestor from whom they inherit, are subject to collation, and prescription is not a bar to the collation, as running at any time prior to the death of the ancestor from whom they inherit.

Prescription does not date from a day anterior to the opening of the succession, and the collation is due and exigible.

Succession of Couder, 265.

A title defective in form can not be the basis of prescription. By this is meant a title on the face of which some defect appears, and not one that may be found defective by circumstances, or evidence *dehors* the instrument.

Train & Faivre vs. Cronan et al., 551.

Property of one person can not be sold confusedly with those of others where there is no privity of estate between the parties; one person's property can not be sold to pay the debt of another.

The transferees from the State of property held by it under such a title are not protected by the prescription of three and five years.

Howcott & Ransdell vs. Levee District, 822.

To divest the title of the owner, the adjudication of his property for taxes must be preceded by notice to him. Const., Art. 210; 30 An. 871; 43 An. 726, 427.

The prescription of three years will not avail the adjudicatee at the tax sale or those claiming under him, when no such notice has been given the owner. *Ibid.*

Parish of Concordia vs. Bertrou, 856.

Notice being a condition precedent to the validity of the sale, the absolute want of notice is not cured by the prescription of three or five years.

Montgomery et al. vs. Land and Lumber Co., 408.

No one can acquire title to any part of the public domain by the prescription *acquiritendi causa*.

State vs. Buck and Fruit Co., 656.

PRESCRIPTION—Continued.

Prescription does not attach to a right for which judgment can not be obtained.

There is a suspension of prescription on those rights for which plaintiff has no cause of action.

The principle *contra non valentem* applies.

Fernandez vs. City et al., 1180.

The maxim *contra non valentem agere non currit prescriptio* does not apply to the prescription of ten days for filing oppositions to a voluntary surrender. 11 An. 36.

Romano & Guerriero vs. Creditors, 1176.

An action to recover the amount of alleged debts paid and advanced for another, is an action for the settlement of a partnership and is prescribed by ten, not by one, three or five years. Civil Code, Arts. 3358, 3554; Act of 1888, No. 76; 12 Rob. 148.

Reddick vs. White, 1199.

Informalities of a sale are cured by the prescription of five years.

Ross vs. Enaut et al., 1251.

PRIVILEGES.

The lessor's claim for rent and certain privileged debts rank the debt of the vendor of movables, and when the funds brought on the account it is manifest, leave nothing for such vendor after satisfying the privileged debts preferred to him—the judgment directing him to be put on the account will be reversed.

Searcy & Co. vs. Creditors, 376.

The vendor preserves his privilege though he takes notes for part of the price, and no presumption that he novates the debt and extinguishes the privilege arises from the fact that in acknowledging delivery of the notes he gives a receipt worded: "I acknowledge receipt of the price, payment being satisfactory and in notes," especially when by the contract notes were to be given for part of the price, and besides when it appears by the testimony no novation was intended. To hold that the privilege of the vendor was extinguished under such circumstances would be subversive of the principle that novation is never presumed,

PRIVILEGES—Continued.

but is accomplished only by discharge of the debt or express agreement of the parties (Civil Code, Arts. 2185, 2190, 3227; 16 La. 469; 34 An. 535).

Adler vs. Burton Lumber Co., 379.

A person who has made advances of money and also of supplies in kind, in aid of the deadening of trees and the cutting and hauling of logs, can not claim a privilege for the whole advances on the logs and also a vendor's privilege on the special articles furnished. *McRae vs. His Creditors*, 16 An. 806.

Shingle and Lumber Co. vs. Lorio, 441.

Privilege claims are not affected by the respite proceedings, and by consenting to the same, privilege creditors do not waive their liens and privileges.

Block & Co. et als. vs. Jefferies et als., 1104.

PROOF, BURDEN OF—IN CRIMINAL CASES—INTOXICATION.

Intoxication of the accused to such a degree as to render him incapable of malice in the perpetration of a homicide is a special defence, like a plea of insanity, and puts the burden of proving it upon the party urging it, and its truth must be established by a fair preponderance of evidence.

While it is the duty of the prosecution to make out the malicious intent of the accused in the perpetration of a homicide beyond a reasonable doubt, yet it is not its duty to prove a negative by showing that the accused was not intoxicated to such a degree as to render him incapable of entertaining malice at the time of the homicide beyond a reasonable doubt; and the trial judge was guilty of no error in refusing to so charge the jury.

State vs. Hill, 27.

PUBLIC DUTY.

Private actions do not lie for breach of public duty.

Section 36 of Act 20 of 1882, the charter of the city of New Orleans, requiring owner of lots to keep the banquette in front of same in repair, and Act 114 of 1886, authorizing the City Council to establish a uniform grade of banquettes, and requiring the owner of lots fronting on the banquettes to make the grade, imposes

PUBLIC DUTY—Continued.

upon the lot owner a public duty, and a person injured by the neglect of the lot owner to repair the banquettes, or to make the uniform grade, can not bring a private action against the owner of the premises for the injury sustained for this breach of public duty.

Betz vs. Limingi, 1113.

The duty of the property owner in repairing the banquettes and conforming to an established grade, is to the whole public of the city, all of its inhabitants who own in common the banquettes. The punishment for breach of this public duty must be in some form of public prosecution and not by a suit for damages by an individual.

There are certain burdens imposed upon individual members of a community for the benefit of individual and particular members of the same, which, for a violation of the duty imposed, may give rise to an individual right of action as well as a public prosecution.

The distinctions between the duty imposed as due to the collective community and that due to individuals is readily distinguished by the nature of the obligation.

Id.

PUBLIC POLICY.

The court in aid of public policy and the law will notice, irrespective of the pleadings, that the controversy submitted for adjudication grows out of illegal purposes or combinations; the illegality made manifest by the record, it is obligatory on the court to dismiss the suit.

Fabacher vs. Bryant & Mather, 820.

A mere paper assignment by third opponent of her homestead claim to her husband's seizing creditor, without any consideration, is a nullity, and can not found any rights in his favor, and can not exclude the assertion of her rights afterward.

The waiver or renunciation of a homestead claim, it being a provision of law in favor of the destitute, is against public policy.

Comeau vs. Miller, 1324.

PUBLIC PROPERTY—SERVITUDES.

Granted that the banks of a navigable stream are public property, and that any one may freely land their boats, tie to trees and deposit their goods on navigable streams; that there is a servitude of way in favor of the public along the banks of navigable streams for levees and public roads, and that no one may obstruct a public road by building a fence across it without authority, it does not follow that a plaintiff can have annulled the proceedings of a police jury, changing the direction of a public road, in order that he may retain the privilege of reaching a landing place on a public stream over the lands of private individuals.

Hyde vs. Teal, 652-3.

No one can acquire title to any part of the public domain by the prescription *acquirendi causa*.

State vs. Buck and Fruit Co., 656.

RECEIVERS.

The court of the first instance having acted upon the resolution of the company consenting to the appointment of a receiver, a suspensive appeal will not lie from the decree of appointment without proof that the resolution was *ultra vires*, or that it was, in other respects, illegal and improper.

State ex rel. Brewing Company vs. Judge, 100.

The courts have power to appoint receivers of corporations whenever necessary to preserve the interest of all concerned, and those who have ratified the appointment can not recall their consent, and in *ex parte* proceeding prosecute a suspensive appeal from the order appointing the receiver.

The order appointing the receiver in effect sustains the *status quo* of the corporation, and was issued to prevent instead of to cause injury.

Should it become apparent that the injury is actual or threatening, the appeal will be allowed upon proper application.

State ex rel. Gaiser vs. Judge, 110.

Slate ex rel. Fox & Searles vs. Judge, 114.

State ex rel. Feldner vs. Judge, 116.

REMOVALS—FROM OFFICE.

The provisions of Art. 201 of the Constitution, that for any of the causes enumerated in Art. 196 district attorneys, clerks of court, sheriffs, coroners, recorders, justices of the peace, and all other parish, municipal and ward officers, shall be removed by judgment of the District Court of the domicile of such officer (in the parish of Orleans the Civil District Court) are not exclusive of all other methods by which municipal officers may be displaced. The power granted by the General Assembly in Secs. 58 *et seq.* of the charter of New Orleans to the Common Council to remove the recorders of the Recorder's Courts by impeachment proceedings is constitutionally granted.

State ex rel. Whitaker vs. Adams et al., 830.

RESPITE.

The respite is a judicial contract between the debtors and creditors and among the creditors. Therefore neither debtor nor creditor can take advantage of the other, and the creditors must remain on an equal and fair footing.

If the debtor does any fraudulent act to give an undue preference, *ipso facto* he becomes an insolvent, and the respite proceedings are converted into a cession.

Privilege claims are not affected by the respite, and by consenting to the same privilege creditors do not waive their liens and privileges.

Creditors in a respite can not sue to have property returned to the debtor's estate for their individual benefit. Any action in other direction by an individual creditor will inure to the benefit of all the creditors.

If no opposition is made to a respite in ten days it can be set aside. The alternative is to convert the proceedings into a cession of the debtor's property.

Block & Co. et als. vs. Jefferies et als., 1104.

When the respite debtor has absconded and abandoned the property on his schedule the courts have power to issue the requisite conservative writs to protect the property, and to appoint a syndic until a meeting of creditors can be convened.

RESPITE—Continued.

A written notice to the creditor in respite proceedings is essential, but when the debtor informs the creditor of his intention to ask a respite, and the creditor answers that he does not wish to participate in the proceedings for fear of losing some advantage, but will not take steps against the debtor if the creditors agree to give time, the creditor can not, after the respite is granted, because of want of notice, seize the property placed on the schedule. To all intents and purposes he consented to the respite. *Id.*, 1105.

Under the Act No. 134 of July 12, 1888, the creditor seeking to set aside the respite granted his debtor must prove his failure to make the payments required by the respite, and such proof is not dispensed with because the debtor ruled to show cause why the respite should not be set aside fails to show cause or files a frivolous exception.

Marx vs. Creditors, 1271.

See Insolvency.

SALE.

The adjudication of property at a judicial sale is itself a complete title, which can not be divested, unless the purchaser refuses to comply with the terms.

The purchaser having complied with his bid by paying the price, the delay to execute an act of sale did not have the effect of annulling the adjudication, nor did it in any respect affect the rights of the owner. *Interdiction of Onorato*, 73.

The adjudication by the auctioneer of the property to the purchaser is a complete title. No other is necessary and essential to vest title in the adjudicatee. The auctioneer who made the sale can make the deed and receive the price if no opposition is made by the executor, or in his absence.

The fact that there is no one to receive the price can not annul the adjudication. The purchaser can retain the price until some one is authorized to demand it or he can relieve himself of responsibility by depositing same in court.

Succession of Massey, 126.

SALE—Continued.

Where, under a mortgage alleged to be a simulation, a sale is made to one who discloses himself at the sale as the holder of the notes and who bids in the property for a part of his mortgage and does not pay the price, it seems clear that an action charging the adjudicatee with knowledge of the simulation can be maintained against him, to have the sale declared null, even though the parties bringing the action may, prior to the sale, have inconsistently claimed at the same time the proceeds of the sale and asked for the annulment of the sale. The claim for the proceeds could not in any manner injure an adjudicatee who would know that the sale is simulated and he could not be permitted to derive any benefit from the fact that such a claim had been made. *Herber vs. Thompson*, 191.

The prohibition contained in Art. 2454, C. C., contemplates a sale of an entire succession; or, in other words, the sale of all that the vendor *may* own at his death. It does not purport to prohibit the sale of any single, isolated piece of property that an individual may own, such as a policy of life insurance, although it might happen to be all the property he possessed at the time; and the case would not be altered, if it should transpire that he afterward acquired no other property. To place upon the article a different construction would be to render it impossible for an individual to do as he pleased with his own.

Stuart vs. Sutcliffe et al., 246.

In the interpretation of the descriptive words of deeds and grants, fixed monuments, whether they be natural or artificial, govern.

Gughlielmi vs. Geismar, 281.

A succession sale made under an order granted by the clerk of court upon application of a person acting as administrator can not be dealt with as an absolute nullity upon the ground that the particular person had not the qualifications necessary for the appointment, nor because, though letters of administration signed by the deputy clerk were in the record, there was no direct evidence of an appointment by the clerk. The action of the latter granting the order of sale was a recognition by him of such an appointment and that the party had legally qualified under it

SALE—Continued.

Where the deed under which a party claims title to real estate as vendee at a succession sale does not recite that it was made under order of court and is otherwise silent as to the observance of the formalities essential to the legality of such a sale, and where the evidence shows that the auctioneer in selling departed from the terms of the order authorizing a sale, such title can not serve as the basis for the commencement of the prescription of ten years.

When the title tendered to a purchaser makes no reference to that under which the vendor holds, bad faith can not be presumed in the purchaser from the fact that the vendor's title was of record and fatally defective.

Declarations of former owners of property in derogation of their own title and good faith made after they had ceased to be owners are not admissible against the subsequent vendees of the same.

Heirs of Ford vs. Mills & Phillips, 331.

It is not established that the person interdicted in 1893, whose curator sues to set aside a deed of sale, was *non compos mentis* in 1879, at the date of the sale; nor is it established that he was at the time, because of the weakness of his mind, unable to give his consent intelligently as a vendor of his property.

Vanosdel vs. Hyce, 387.

When a married woman, separate in property, sells by authentic act her paraphernal property, although the sale is a disguised mortgage for the benefit of the husband, yet if the notes given for the purchase price fall into the hands of innocent third parties, the vendor's lien and special mortgage securing the notes will be enforced.

There is no distinction in principle, between the holder of notes given for the purchase price of the property, and the purchase of such property, as the reliance of both of the note holder and purchaser is upon the public record. When that discloses an unimpeachable title, the protection of the law is afforded as against unknown and latent defects. *Schepp vs. Smith*, 35 An. 6.

Lester vs. Sheriff et al., 340.

SALE—Continued.

The purchaser sued for the price is entitled, notwithstanding the prescription of the action *quantum minoris*, to claim a reduction of the price for defects in the thing sold. Civil Code, Arts. 2541, 2544; 1 N. S. 488; 2 An. 548.

Edwards & Kurz vs. Cold Storage Co., 360.

When a machine stipulated to be furnished is delivered to the party bound to receive and pay for it, who, after a fair opportunity for examination and trial of the machine, promises payment of the price with conditions afterward waived by him, in the suit brought to compel that payment, the burden of proof will be on the defendant to prove the defects in the machine alleged to exist. *Id.*, 361.

The deed of sale by the warrantor contained a stipulation of no warranty.

The buyer, not being aware of the danger of eviction, is entitled to recover the price paid.

Montgomery et al. vs. Land and Lumber Co., 403.

The dissolving condition in the contract of sale can not be enforced when the plaintiff in the suit represents only part of the price remaining due. Civil Code, Arts. 2045, 2046; *Leflore vs. Camors*, 7 An. 67; *Castle vs. Floyd*, 38 An. 589.

In the action to dissolve the sale for non-payment of the price, tender to the purchaser of the price he has paid is a prerequisite for maintaining the action and hence can not be dispensed with, on the ground that the purchaser's liability for the revenues compensates the price to be returned by the vendor. *George vs. Knox*, 23 An. 354; *McDowell vs. Taylor*, 14 An. 729; *McKenzie vs. Bacon*, 43 An. 534; 21 An. 425.

Bryant vs. Stothart, 485.

A patent for public lands reciting that a named party has purchased all the unsurveyed sea marsh in a certain township and range, west of the Mississippi river, except certain surveyed lots situated on the river, containing a certain number of acres, and extending back to a certain named bay, according to the official plat of the survey of said lands, in the State Land Office, does not evidence a sale *per aversionem*.

SALE—Continued.

The accessories of the thing sold follow the principal. If a horse with saddle and bridle has been sold, in setting aside the sale of the former that of the latter follows. But if the principal thing was not defective and the accessory was, the cause to set aside the sale is limited to the latter. Troplong (*Vente*, 579).

Burt Co. vs. Laplace, 729.

It is a correct principle that the right to set aside the contract arises only when the several things sold are dependent upon each other, so that the defect of one renders the other useless and without value. 6 M. 696; 8 N. S. 100.

Id.

A paper in the nature of a counter letter to the effect that the person executing it has no interest in certain property apparently conveyed to her by authentic act is effective as a renunciation of title, and protects the purchaser acquiring the property from the party in whose favor the renunciation is made. Civil Code, Arts. 2239, 2240, 2242; 7 La. 151; 10 La. 411.

Palmes vs. Kuhn, 906.

Where a sale is made, for the payment of debts, of property belonging to a succession in which minors have an interest, it is not necessary to observe the formalities required by law for the alienation of minors' property, the interest of the minors being residuary.

Succession of Lange, 1017.

An act under private signature which recites that, for and in consideration of a person named, paying a certain mortgage note on one-half interest in the Moss Side plantation, the heirs of the deceased owner do transfer all of their rights, titles and privileges in said property belonging to their ancestor, renouncing all their interest in his favor, is a conveyance of the property evidencing a sale in the sense of the Code.

Warner et al. vs. Reddy, Executor, et al., 1099.

The purchaser of property is presumed to acquire all actions appurtenant to the property and necessary to its perfect enjoyment, but damages suffered by the vendor before the sale are personal

SALE—Continued.

to him and are not transferred, and can not be recovered by the purchaser unless expressly transferred. Mention must be made of the right of action and by whom the damage was done, and against whom the action must be directed.

Bradford vs. Damare, 1530.

See Estoppel.

SEQUESTRATION.

It is more than doubtful whether a sequestration will lie antecedent to the maturity of the debt sued on in any case except that indicated in Code of Practice, Art. 275, par. 6.

Conceding *arguendo* that the dismissal of an original petition does not necessarily dissolve a sequestration issued under it, and that the *status quo* of a seizure under it may be saved by a supplemental petition subsequently filed, yet, in order that same be rendered efficacious, it must be sworn to.

Egan vs. Fush, 474.

SEPARATION OF PROPERTY.

See Husband and Wife.

SIMULATION.

Two acts of sales declared simulated and fraudulent, in view of the testimony as to the relations of parties, the small means of the purchasers relatively to the value of the things purchased, the simultaneous passing by the vendors of a series of acts by which they transferred all of their property to third persons, the suddenness of the propositions to sell, the celerity with which terms of sale were fixed and sales made, the active interest in the affairs of the vendees manifested by the vendors after the sales, and the correspondence of after occurring events with prior announced intentions by the vendors.

National Bank vs. Viterbo Bros., 1313.

See Sale.

SLANDER.

See Damages.

STATE DEBT—BOARD OF LIQUIDATION.

Act 3 of 1874; Act 58 of 1877, regular session, and Act 77 of 1877, extra session, were not repealed by the adoption of the Constitution of 1879, and the debt ordinance thereto appended.

The constitutional amendment of 1874 embodies the purport and substance of the legislative enactment of that year, and declares that the tax required for the payment of the principal and interest of the bonds shall be assessed and collected every year, until the bonds shall be paid, principal and interest; and the debt ordinance declares that there shall be levied an annual tax sufficient for the full payment of the interest on the bonds.

There is no essential difference in the phraseology of the two constitutional enactments.

The legislative enactments of 1877 provide that any surplus that may remain after the payment of interest coupons shall be deposited with the fiscal agent at credit of a specific and distinct fund, to be called and known as the Redemption of the Public Debt Fund, and shall be used exclusively under the directions of the board of liquidation, for the retirement and sinking of the consolidated bonds and past due coupons.

The act of 1877, extra session, makes it the duty of the treasurer to keep separate accounts of the income and expenditures of each year; and, after setting apart or paying out an amount thereof equal to the appropriations and warrants lawfully made against each of said funds, the surplus, if any remain, shall be immediately deposited by the treasurer to the credit of the Redemption of the Public Debt Fund.

The debt ordinance deals exclusively with the interest and not the principal of the bonds, leaving the latter in *statu quo*; and the fact that the bondholders were given an *option* to surrender their holdings and recover other bonds in exchange, on the terms proposed therein, did not impair their force or validity. All statutes enacted since the adoption of the debt ordinance of 1879 must be construed in conformity therewith.

In point of fact all subsequent statutes deal with an existing fund—an interest tax surplus—already collected under existing laws, and, at most, same could only lead to the supposition that the laws of 1874 and 1877 were not operative; and had it been intended by the Legislature to repeal any of said laws, same would have been nugatory and void.

State ex rel. Board of Liquidation vs. State Treasurer, 5.

SUCCESSIONS.

When a testator directs in his will that his immovable property be sold by his executor, an order of sale rendered thereon for the sale of the property is valid.

If the executor dies pending the proceedings for the sale, his death does not have the effect of annulling the order or arresting the sale.

It is the law that an executor's authority is confined to the execution of the will, and that he can only sell property, movables first and thereafter immovables, in default of funds to pay debts and legacies. But the Code, Art. 1639, makes an exception when the executor is directed to sell immovable property by the will.

The rights of the widow in community and the heirs of age are fixed at the testator's death, and these rights are personal to them. If they make no objection to the sale of the property directed by the will, the adjudicatee has no cause of complaint. They waive their personal rights by making no opposition to the execution of the will, and the order of sale by the court is a complete protection of the adjudicatee's title.

The adjudication by the auctioneer of the property to the purchaser is a complete title. No other is necessary and essential to vest title in the adjudicatee. The auctioneer who made the sale can make the deed and receive the price if no opposition is made by the executor, or in his absence.

The fact that there is no one to receive the price can not annul the adjudication. The purchaser can retain the price until some one is authorized to demand it, or he can relieve himself of responsibility by depositing same in court.

Succession of Massey, 126.

The power of courts to order the remission of funds belonging to a foreign succession to the representatives of the succession authorized to receive them, by the courts of the domicile of the deceased, we consider undoubted. Its exercise is necessarily a matter of discretion, depending on the circumstances of each case, and is a consequence of that comity which prevails between nations in amity with each other.

The interests of commerce and civilization require that this comity should be carried into effect by our tribunals.

SUCCESSIONS—*Continued.*

It is done in England and in other States of the Union, in analogous and similar cases; and whenever the rights of our citizens are not affected by the act to be done, it is the duty of this court to act on a principle which is impressed on us equally by an enlightened policy and a certainty that it will tend to the great purposes of justice.

Succession of Gaines, 252.

Debts of the heirs, like donations to them by the ancestors from whom they inherit, are subject to collation, and prescription is not a bar to the collation, as running at any time prior to the death of the ancestor from whom they inherit.

Prescription does not date from a day anterior to the opening of the succession, and the collation is due and exigible. The plea of prescription is overruled and the heir is ordered to collate.

Succession of Couder, 265.

Where, after the succession has been placed under a regular administration an olographic will of the deceased is found bequeathing the usufruct of certain specific property to a particular person, and this will is, at the instance of the legatee, offered for probate by an attorney at law and probated over the opposition of the heirs and the administrator, remuneration for such services must be sought not from the succession, but the particular legatee.

To sustain a claim made by the mistress of a man that she is entitled to one-half of the property left by him at his decease, on the ground that it was the result of their joint thrift and industry and economy, where there is no evidence to show that she had furnished a cent for the purchase of the property, but, on the contrary, occupied toward him the relation of his servant, would be to place the mistress substantially on the footing of a wife. Such a claim is sustainable neither by law nor by morals.

Succession of Morvant, 302.

The executor, being charged with the duty of seeing that the proper security should be given by the usufructuaries under the law, is entitled to commissions upon the appraised value of the property so bequeathed.

Id.

SUCCESSIONS—*Continued.*

Where a matrimonial community of acquets and gains exists and the wife dies and her succession is opened by the qualification of the husband as the natural tutor of his minor children issue of his marriage with the decedent, a creditor who has obtained a judgment on a community debt can not compel an administration of the wife's succession. His remedy is to proceed against the surviving husband and the community property.

Succession of Hooke, Wife of Ashbey, 353.

A "judgment by default" did not conclude the parties and cut off a renunciation by them of their mother's succession—such a judgment not being definitive in its character.

The tacit admission resulting from the judgment by default disappeared at once upon the filing of the disclaimer without the necessity of a formal setting aside of the default by motion.

It was not necessary, in order to prevent judgment being rendered against these parties as heirs of their mother, that they should have renounced her succession by notarial act; the paper filed by them sufficed for that purpose. Defendants owed no duty to plaintiff—were not its debtors and could not be forced against their will to accept the succession.

The parties cited having, however, not disclaimed being heirs of their brother, but allowed a definitive judgment to be given against them as such, must be held to have accepted his succession and they as such heirs represent directly an interest in the interest formerly held by him.

The immediate heirs of the mother having renounced her succession and there being no others known, plaintiff and the court are warranted in acting upon the assumption that the interest which had been cast upon the mother had devolved upon the sister and the three brothers by reason of accretion and the indivisibility of their acceptance of their brother's succession.

A sale by licitation made contradictorily with the parties now before the court will convey a legal title to the purchaser.

Bank vs. Choppin et als., 630.

Though the issues raised in an opposition to an administrator's account may be such as to require to be disposed of by a direct action, the opposition may stand by way of notice.

SUCCESSIONS—*Continued.*

In proper cases where the result of a pending suit is dependent upon the decision in another, proceedings in the first may be stayed to await that decision.

The actions of an administrator should be subjected to full investigation. Whenever they appear of questionable legality, ratification of the same should be established by very clear proof. Whenever practicable light should be thrown in aid of right.

Succession of Trozler, 738.

Where a person in his will bequeaths to his wife certain property, and appoints her as his executrix without seizin, it is her duty, in filing her final account, to account for all property left by the testator at his death, including that specially bequeathed to her, and to pray that she be authorized to dispose of the same in such manner and to such persons as she believes should be made under the terms of the will and the law. The heirs must be cited and made parties to this account and demand, and they have the legal right to make available all objections which they have to the same by oppositions thereto. Objections to the special legacy to the wife as being in excess of what could be bequeathed to her by her husband, can be urged in that way, as can also all objections to the items of the inventory, as being either appraised too high or too low. C. P. 1004.

Succession of Von Hoven, 911.

Where a sale is made, for the payment of debts, of property belonging to a succession in which minors have an interest, it is not necessary to observe the formalities required by law for the alienation of minors' property, the interest of the minors being residuary.

The court *ex officio* holds further, that though the property was sold in the succession for the payment of debts, and without the formality for the alienation of minors' property, the tutor, who is to receive the price, in the interest of all parties concerned, must furnish bond in the amount required by law.

Succession of Lange, 1017.

See Administration.

SUPREME COURT.

Writs of *certiorari* and prohibition will not issue restraining the District Court from hearing a case on the merits; it being appealable to this court. *Sheriff et al. vs. Judge*, 29.

The powers of the Supreme Court, under Art. 90 of the Constitution, are not confined to writs of *certiorari*, prohibition, *mandamus* and *quo warranto*, but extend to other remedial writs.

Parties complaining of an order "suspending until after hearing" a prior order of injunction must, before invoking the supervisory powers of the Supreme Court, have unsuccessfully sought to have the "suspending" order rescinded. Where a restraining order is sought pending an examination of issues submitted for examination, the whole case should as far as practicable be placed before the court. *State ex rel. Lehman vs. Judge*, 164.

Where, in a case, the Supreme Court has grave doubts as to the fact of the marriage of the plaintiff with the deceased, it will remand the case for a new trial, notwithstanding the verdict of a jury and the judgment thereon rendered. *Jackson, Tutrix, vs. Railroad Company*, 226.

The premises upon which the plaintiff relies may be error, but arguing in support of the grievances he alleges, and assuming for the purpose of testing a question of jurisdiction that the law he invokes bears him out, the Supreme Court has jurisdiction of the case. *Hyde vs. Teal*, 650.

Each of these defendants traces his title to one author and is interested in maintaining the sale attacked by the plaintiff. If nullity be decreed it will have the effect of absolutely destroying each title. The validity of the *mesne* conveyances under which each holds is not at all at issue. All interest centres in the deeds assailed. The value of the property involved determines the jurisdiction of the court. That property involved in this case in which each of the defendants is interested in maintaining the title is of a value within the jurisdiction of the Supreme Court. A similar question was determined in *Derbes vs. Romero*, 28 An. 645. Multifariousness of suits is to be avoided if consistent with reasonable interpretation of the laws conferring jurisdiction. *Ross vs. Enaut et al.*, 1254.

SUPREME COURT—Continued.

Assessments or taxes to build and maintain levees under acts organizing and providing for Boards of Commissioners of levee districts, though treated as local assessments not subject to the rule of conformity, or the limitation applicable to general taxation, still are taxes within the purview of Art. 81 of the Constitution, giving to the Supreme Court appellate jurisdiction in all cases involving the constitutionality or legality of any toll, impost or tax whatever. Constitution, Art. 81; Acts No. 44 of 1886, No. 79 of 1890; Burroughs on Taxation, Chapter XXII; 11 An. 338, 222; 28 An. 323; 29 An. 460; 43 An. 339.

State ex rel. Hill vs. Judges, 1292.

The jurisdiction of the Supreme Court over cases involving the constitutionality or legality of taxes, fines, penalties or forfeitures imposed by a municipal corporation does not extend to a case presenting the question of the validity of the payment by a dog owner of a so-called dog tax, under the town ordinance authorizing the killing of dogs running at large, without a collar obtained from the town and to be paid for by the owner of the animal. Constitution, Art. 81.

Suthon vs. Town of Houma, 1561.

TAXES.

The plaintiff, a municipal corporation, can proceed by rule to compel the tax-payer to deliver to the tax collecting officer the personal property assessed, to the end of realizing, at public sale, the amount of the taxes, costs and penalties.

The plaintiff's remedy in this respect is similar to that of the State.

City vs. Insurance Company, 556, 557.

The attorney appointed to assist the tax collector is not an assistant to that official in his capacity as tax collector, but is appointed as a necessity for the purpose of bringing suits, which is an employment separate from and independent of the duties of the tax collector's office. Sec. 54 of the Act 55 of 1818 is not in conflict with Arts. 52, 203, 210 of the Constitution.

Tax Collector vs. Shareholders, 563.

TAXES—Continued.

The proviso in Art. 207 of the Constitution of this State excludes from exemption from taxation schools that are conducted for private benefit.

Lichtentag vs. Tax Collector, 572.

See Citizens Bank; Exemptions; Levees.

TAX SALES.

The purchaser must pay all the taxes, including those assessed after the property had been adjudicated to the State. *Breaux vs. Negrotto*, 43 An. 432; *Martinez vs. Tax Collector*, 42 An. 677; *Morrison vs. Tax Collector*, 30 An. 432.

The forfeiture to the State under Act 96 of 1877 vested full title in the State of all the right and interest of the party assessed in the property, subject only to a right of redemption.

Reinach vs. Duplantier, 154-5.

An assessor can not bring together a number of distinct properties belonging to different individuals—fix a single valuation upon them as a whole, and, ascribing the ownership of them all to one of the owners, assess taxes against him to the full amount of the assessment on that false assumption.

The act of the tax collector in advertising and adjudicating said properties in block to the State in enforcement of the delinquent taxes thereon so assessed, was without legal authority.

Property of one person can not be sold confusedly with those of others where there is no privity of estate between the parties; one person's property can not be sold to pay the debt of another.

The transferees from the State, of property held by it under such a title are not protected by the prescription of three and five years.

Howcott & Ransdell vs. Levee District, 322.

Police juries have the capacity to buy the property of delinquent tax-payers seized, sold and adjudicated at sheriff's sale under the judgment and execution of the jury against the delinquent. Const., Art. 118; R. S., Secs. 3321, 351, 354; 2 H. D. 1157, No. 1, *et seq.*

TAX SALES—Continued.

To divest the title of the owner, the adjudication of his property for taxes must be preceded by notice to him. Const., Art. 210; 30 An. 873; 43 An. 726, 427.

The prescription of three years will not avail the adjudicatee at the tax sale or those claiming under him, when no such notice has been given the owner. *Ibid.*

Parish of Concordia vs. Bertrou, 356.

Statutes to divest title must be strictly construed.

The requisite notice must be given according to statute.

Notice being a condition precedent to the validity of the sale, the absolute want of notice is not cured by the prescription of three or five years.

Montgomery vs. Land and Lumber Company, 403.

In a petitory action, where plaintiff alleges the absolute nullity of certain tax sales under which it is assumed defendant will attempt to set up title, it is not necessary to make all the parties to those sales parties to the action. *Belard & Johnson vs. Gebelin*, 46 An. 326; *Heirs of Ford vs. Mills & Phillips*, 46 An. 331; *Dauterive vs. Opera House Association*, 46 An. 1817.

A tax sale made under the provisions of Act No. 47 of 1878 not preceded by the seizure of the property then required through the recording of a description of the property with the amount of taxes due in the mortgage books of the parish where the land is situated is fatally defective. The prior seizure was by the law a condition precedent to a right or authority in the tax collector to sell.

Mays vs. Witkowski, 1475.

UNIVERSITY OF LOUISIANA.

The Board of Administrators of the University of Louisiana having contracted and agreed with the city of New Orleans, for a fair and adequate consideration, to educate five boys of indigent parents, to be appointed annually from the public schools of the city of New Orleans, said administrators and their successors and assigns can be kept to their agreement, and held bound to accept and educate the designated number of boys of indigent parents, when properly appointed.

City vs. Board of Administrators, 861.

WILLS AND TESTAMENTS.

The law not having designated the particular place in which the date must be put in an olographic will, it may be placed at the head, at the foot, or in the body of the instrument.

A demand in nullity of a testament, on the ground of captation and suggestion, is barred by the provisions of Art. 1492 of the Revised Civil Code.

An action in nullity of a testament, on the ground that it was obtained by means of the ascendancy required by the legatee over the testatrix, in his character as minister of religious worship, while in attendance upon her during the illness of which she died, is barred by the provisions of Arts. 1489 and 1492 of the Revised Civil Code. Further averment is necessary if the legatee is the husband of the testatrix, that he married her in fraud of the law, or with the fraudulent design of defeating the incapacity established by law.

Zerega vs. Percival, 590.

When a will is established to have been made by the testator himself, or by a notary at his instance and dictation, in the presence and hearing of the subscribing witnesses, unaided by others, and its provisions and expressions are sage and judicious, containing nothing sounding to folly, these facts establish a presumption, even in the case of a person habitually insane, that it was made during the existence of a lucid interval, and impose on those who attack the will the burden of proving insanity at the moment when it was made.

Succession of Bey, 773.

Death of the testatrix by suicide does not raise a presumption of insanity at date the will was executed. Even when the suicidal act is unquestionably the effect of insanity, it does not necessarily follow that a will prepared within a short time previous is invalid.

Id., 774.

The legacies to minors, to be held and administered for their benefit by the executrix of the deceased, and not paid to them until their majority or emancipation, is valid. *Succession of Macias*, 31 An. 127; *Strauss Succession*, 38 An. 59.

WILLS AND TESTAMENTS—Continued.

Such a disposition imposes the trust on the executrix to hold and administer the legacies as directed by the will, and that trust continues, notwithstanding the discharge of the executor granted on her petition.

This trust continuing, there is no basis for this court to direct the payment of the legacies to the dative tutrix of the minors.

Calvert, Tutrix, vs. Boullemer, 1182.

The charge that a subscribing witness to a will did not hear the dictation of the testatrix is disposed of by the statement that he could hardly hear her talking because she was very sick.

The charge that a subscribing witness could not understand or speak the French language is disposed of by proof that the testament was dictated and wholly written in the English language.

The purposes of the law are subserved by proof that the language employed by the testatrix was fully understood by the notary, and faithfully expressed in the testament as written by the notary.

Succession of Cauvien, 1412.

To meet the requirement of the law, the proof, administered on a charge that a certain phrase of the testament was not, in point of fact, dictated by the testatrix, must be sufficient to overcome the sanctity that attaches to a *quasi* official record, and the legal presumption that is thereon raised, in favor of the truthfulness of its recitals, and the just performance of an official act by a public officer.

Id., 1413.

The nuncupative testament by public act must make authentic proof of its execution in accordance with Art. 1578, Civil Code, and Art. 1579, when the testator is incapable of signing his name.

The notary must expressly mention that the will was dictated by the testator and written by the notary as dictated, and the reading of the will to the testator in presence of the witnesses.

No express mention is required of the signing of the will, except in the contingency provided for in Art. 1579, Civil Code. It is essential to the validity of the nuncupative will by public act that the formalities of dictation, and reading the will in presence of witnesses and testator be expressly mentioned in the body thereof,

WILLS AND TESTAMENTS—Continued.

and all fulfilled at one time, without interruption or turning aside to any other act; but it is not imperative that the notary shall declare in the will that the formalities were done at one time and without interruption. If he fails to declare this essential requisite to its validity, the party attacking the will must show the interruption.

In receiving the will as dictated by the testator, the notary may interrogate him as to his exact meaning, providing no suggestions are made which result in changing the intentions of the testator.

Where an uneducated person dictates his will in the idiom peculiar to the uneducated, it is no ground for nullity that the notary writes the will in polite language, provided the exact meaning of the testator is preserved.

Succession of Saux, 1423.

See Administration; Successions.

ERO.

7086-91

